Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

# APPENDIX
# VOLUME I

# SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-853

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UNITED STATES STEEL CORPORATION, et al. - - - - - - - - Petitioners

*versus*

FORTNER ENTERPRISES, INC. - Respondent

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On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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PETITION FOR CERTIORARI FILED DECEMBER 18, 1975
CERTIORARI GRANTED FEBRUARY 23, 1976

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# UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 4392

Fortner Enterprises, Inc. - - - - - Plaintiff

vs.

United States Steel Corporation and
United States Steel Homes Credit Corporation, Defendants

## DOCKET ENTRIES.

1962

7/19 Complaint filed with Exhibits A & B. Summons issued and delivered to U. S. Marshal with 2 copies of Summons and 2 copies of Complaint.

7/23 Summons returned with following notation: "I hereby certify and return, that on the 23rd day of July 1962, I received this summons and served it together with the complaint herein as follows: I hereby certify and return that I served Summons and Complaint on the therein named United States Steel Corporation and United States Steel Homes Credit Corporation by handing to and leaving a true and correct copy thereof with Miss Edna Seebolt, Assistant Secretary of C. T. Corporation, Process Agents for United States Steel Corporation and United States Steel Homes Credit Corporation, individually, and personally at 5th and Jefferson, Ky. Home Life Bldg., Louisville, Ky. on July 23rd, 1962. Harry M. Miller, by Gilbert E. Bryant, Deputy U. S. Marshal."

7/25 Demand for Jury trial filed by Kenneth L. Anderson and A. Scott Hamilton, Jr.

1962

8/ 2 Agreed Order extending time to answer tendered.

8/16 Agreed Order signed by Judge Brooks on 8-16-62—that defs. are allowed an additional 30 days or until September 11, 1962 within which to respond to complaint. Copies to A. Scott Hamilton, Jr. and Albert F. Reutlinger.

9/11 Answer and Counter-Claim filed.

9/11 Interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure filed by Defendants.

9/25 Agree Order tendered.

9/26 Amended counter-claim filed.

9/27 Interrogatories pursuant to Rule 33 of the Federal Rules of Civil Procedure filed by Kenneth L. Anderson. (2 sets)

9/28 Agreed Order (Judge Shelbourne) dated 9-28-62 that plaintiff be allowed until October 26, 1962, within which to respond to the Interrogatories filed by the defendants upon it. Copies to A. Scott Hamilton and Albert F. Reutlinger.

10/ 4 Reply to Amended Counterclaim of U. S. Steel Homes Credit Corporation—filed by attys, for plff.

10/ 5 Defendant U. S. Steel Homes Credit Corp's objections to certain interrogatories propounded by plaintiff filed by Albert F. Reutlinger.

10/ 5 Defendant United States Steel Corp's objections to certain interrogatories propounded by plaintiff filed by Albert F. Reutlinger.

10/ 8 Order (Judge Shelbourne) dated 10-8-62, on defendants' motion, that the objections of each of the defendants to certain interrogatories propounded by the plaintiff heretofore filed, set for hearing on Nov.



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8, 1962, at 9:00 A.M. Copies mailed to counsel of record.

10/ 8 Order (Judge Shelbourne) (agreed) that defendants allowed until 11-16-62 within which to respond to the Interrogatories filed by the plaintiff upon them. Copies mailed to counsel of record. A.R.

10/ 8 "Defendant United States Steel Corporation's additional Objections to Certain Interrogatories Propounded by Plaintiff" filed by A. F. Reutlinger.

10/24 Motion to Strike portion of plaintiff's reply to amended counterclaim filed by defendants. No notice of hearing.

10/25 Interrogatories to Plaintiff and Request for Admissions filed by Defendants.

10/26 Answer to Interrogatories filed by Plaintiff.

10/30 Motion to Overrule Motion to Strike filed by Plaintiff.

Memorandum in support of Plaintiff's Motion to overrule U. S. Steel Homes Credit Corporation Motion to Strike—filed. Order Tendered.

11/ 2 Memorandum of Authorities in support of Defendants' Objections to Certain Interrogatories and Memorandum of Authority in support of Defendant U. S. Steel Homes Credit Corporation. Motion to strike certain paragraphs of Plaintiff's Reply to the Amended Counterclaims.

11/ 3 Motion for extension of time filed by Kenneth L. Anderson. Order tendered.

11/ 5 Answer to Interrogatories filed by Plaintiff.

11/ 8 Response to Request for Admissions filed by Plaintiff.

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11/ 8 Withdrawal of Objections filed by Defendants. (Inter. 10-10a-10b-16-16a-16b-16c-16-d as to both defendants; Inter #11—Credit Corp.

11/ 9 ORDER dated 11/8/62 that plaintiff agreed to withdraw Interrogatories 3, 4 and 5 (propounded to U. S. Steel) and continuing to a date to be fixed by the Court. Copies to Attorneys Anderson, Hamilton and Rentlinger—11/9/62.

11/16 Answers to Interrogatories on behalf to U. S. Steel Corp.—filed.

Answers to Interrogatories on behalf of U. S. Steel Homes Credit Corp.—filed.

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2/15 Second Amended Counterclaim filed. (U. S. Steel Homes Credit Corp.).

2/15 ORDER dated 2/15/62 filing Second Amended Counterclaim of U. S. Steel Homes Credit Corp. Copies 2/15/63 to Attorneys Anderson, Hamilton and Rentlinger. 1a

2/28 Reply to Second Amended Counterclaim of U. S. Steel Homes Credit Corp. filed by Kenneth L. Anderson and A. Scott Hamilton.

3/25 Order setting pre-trial conference on Tues., Apr. 9, 1963, at 9:15 A. M., etc. Copies to Kenneth L. Anderson, A. Scott Hamilton, Albert Rentlinger.

3/29 "Memorandum in Support of Plaintiff's Motion to Overrule Defendants' Motion to Strike Paragraphs 9, 10 and 11 of the Plaintiff's Reply to Counterclaim —filed by Kenneth L. Anderson and A. Scott Hamilton, *Jr.*, attys. for plaintiff."

4/ 3 Affidavit of Harry B. Black filed (Steel Corp.).

7/ 5 Motion to separate trial of the issue of liability from trial of the issue of damage in the anti-trust



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section arising out of the allegations found in the complaint filed by Albert B. Rentlinger, with Memorandum in support thereof.

7/ 5 Motion to require a separate trial of the anti-trust aspects of this litigation from mortgage note foreclosure as set forth in the counterclaim filed by Albert F. Rentlinger, with Memorandum in support thereof.

7/ 9 "Motion to Overrule U. S. Steel Homes Credit Corporation's Motion to Separate the Antitrust Aspects of This Case From the Foreclosure Aspects"—filed by Kenneth L. Anderson, atty. for Plff.

7/ 9 "Memorandum in Support of Motion to Overrule the Motion of U. S. Steel Homes Credit Corporation to Separate the Antitrust and Foreclosure Aspects of This Case"—filed by Kenneth L. Anderson, Atty. for Plff.

7/ 9 "Motion to Overrule Defendants' Motion to Separate Trial of the Issue of Liability From Trial of the Issue of Damages in the Antitrust Action"—filed by Kenneth L. Anderson, Atty. for Plff.

7/ 9 "Memorandum" in support of Motion to Overrule Defendants' Motion to Separate Trial of Issue of Liability, etc.—filed by Kenneth L. Anderson, Atty. for Plff.

7/ 9 "Withdrawal of Objections to Interrogatories" (withdrawing objections to Interrogatories 17, 17a and 17b)—filed by Albert F. Rentlinger, Atty. for U. S. Steel Corp.

7/ 9 "Affidavit" of Richard C. Dyas, Vice President and Gen. Mgr., of U. S. Steel Homes Credit Corp. in support of its objections to some of the interroga-

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tories propounded by Plff. to U. S. Steel Home Credit Corp.—filed.

7/30 ORDER dated 7/30/63 disposing of United States Steel Corporation's Objections to certain Interrogatories propounded to it by the Plaintiff. Copies to counsel of record.

7/30 ORDER dated 7/30/63 (Pre-Trial Order No. 1) that (1) Motion of U. S. Steel Homes Credit Corp. to strike Para. 9, 10 & 11 of reply to and counterclaim is sustained (2) Plff. Motion to overrule said motion to strike is overruled. (3) Motion to separate trial of the issues presented in the counterclaim (and as amd.) of Credit Corp. from trial of issues created by complaint is sustained. From and after the entry of this order, all matters pertaining to the counterclaim (collection of mortgage debt and foreclosure) shall be considered separate and apart from any of the anti-trust aspect of the case. Separate rulings, motions, orders, pleadings, interrogatories, etc., shall be made and entered therein and all further proceedings shall be designated by the number of 4393-A and no further reference shall be made to the United States Steel Corporation in the style thereof. (4) The joint motion of the damages in the anti-trust aspect of the within action is overruled and the plaintiff's motion to overrule said joint motion of the defendants is sustained. Copies to counsel of record.

8/ 5 ORDER dated 8/5/63 that the time within which U. S. Steel Corp. may answer Interrogatory 12(c) is extended to 1/10/64. Copies to counsel of record.

8/ 5 ORDER dated 8/5/63 disposing of U. S. Steel Homes Credit Corp.'s objections to certain interrogatories propounded to it by the plaintiff. Copies to counsel of record.



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9/ 5 Answers to Interrogatories on behalf of U. S. Steel Corp. filed.

9/ 5 Answers to Interrogatories on behalf of U. S. Steel Homes Credit Corp. filed.

9/ 5 (4393-A) Affidavit of W. L. Rollins filed.

12/23 (A) Motion to Appoint a Receiver filed by Defendant with Notice and Motion for Summary Judgment and Memorandum in support of motion for receiver and for summary judgment. Affidavit of Albert F. Rentlinger filed. Order and Judgment tendered.

12/23 Motion for Court to overrule defendants' motion to appoint a receiver and for summary judgment filed by plaintiff with notice of hearing 9:30 am 12/30/63.

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1/ 7 ORDER (AGREED) extending time within which U. S. Steel Corp. may answer Interrogatories 8a, 8b, 8c, 17, 17a and 17b to and including 1/31/64. Copies to Attorneys Anderson and Rentlinger 1/7/64.

1/14 A Motion to appoint a Commissioner filed by defendants. Order Tendered.

1/14 An ORDER dated 1/14/64 appointing Jack E. Madd a Commissioner of this court in the within action (4393-A) for the purpose of aiding the court in enforcing any judgment it may enter herein and setting Commissioner's bond at $25,000.00, which bond will require surety thereon to be approved by this court and shall be conditioned upon the proper execution of Commissioner's duties as may be required by this court. Copies 1/14/64 to Attorneys

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Anderson, Hamilton and Routlinger and to Jack E. Madd, Commissioner.

1/15 (4392-A) JUDGMENT Dated 1/15/64 providing that U. S. Steel Homes Credit Corp. shall recover from Fortner Enterprises, Inc., various sums on various obligations and costs, and Credit Corp. may have execution for the collection thereof. To secure the aforesaid debts (pmt) the Credit Corp. has a lien on various properties described in the judgment, prior and superior to all liens except for the 1962 and 1963 State, County and School taxes which are unpaid. Jack E. Madd, Commissioner, shall advertise the sale and sell the property described at the courthouse door of the Jefferson County Courthouse, Louisville, Kentucky, at 11 am on 3/11/64. At least 15 days before date of sale the Commissioner shall secure an appraisal by two competent persons as to the value of the properties to be sold, said appraisal to be made a part of the record herein (KRS 426.229), appraisal fees to be taxed as part of costs and paid from the proceeds of the sale by the Commissioner as soon as possible. On 4 consecutive weeks next prior to date of sale the Commissioner shall advertise the sale in a daily newspaper of general circulation in Jefferson Co. and shall cause handbills to be distributed advertising the sale. Handbill to be posted at courthouse door 15 days prior to sale. Sale to be at public auction, properties shall be sold in order listed, improved lots with buildings to be offered separately and then as a whole, terms of sale to be 10% cash and the balance on delivery of deed. Various properties listed by groups shall be offered as individual



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lots, then collectively in groups and then as a whole; terms of sale of lots to be 10% cash at the time of sale, 30% cash on delivery of deeds and the balance on or before 18 months from date of deed. Deferred payments to bear interest at 6% per annum from date of sale. Purchaser shall be required to execute bond for deferred payments and a lien shall be retained upon the property conveyed. Purchaser may prepay any payment before maturity without penalty. Purchaser may secure release of the individual lots from the vendor's (4392-A) lien, upon the payment of that individual lot's pro rata portion of the original purchase price related to that group of lots of which the lot to be released is a part, together with accrued interest thereon. All property sold in accordance with this judgment is sold subject to 1962 and 1963 and 1964 State, County and School taxes and all taxes thereafter, easements and restrictions of record and applicable zoning laws, Except for mentioned encumbrances the property is to be sold free and clear of all other liens and encumbrances. The Commissioner, as soon as the sales have been made, deeds delivered and money paid shall pay costs, including a reasonable allowance for his services and thereafter shall pay the aggregate judgment debts of the U. S. Steel Homes Credit Corp. to it. The surplus, if any shall be paid to Fortner Enterprises, Inc. This judgment shall be executed immediately. In the event Fortner Enterprises, Inc. does not promptly execute and deliver conveyances to of the lands to the purchasers thereof the Commissioner shall execute and deliver such. Conveyance by the Commissioner shall convey a good fee simple title, subject only to the

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limitations found in Section 11(k) of this judgment. This action is retained on the docket for such further and necessary orders as the court may determine. Copies 1/15/64 to Attorneys Anderson, Hamilton and Reutlinger and to Jack E. Mudd, Commissioner.

1/27 (4392-A) Oath of Acceptance of Appointment as Commissioner dated January 27, 1964—filed.

1/27 Oath of Commissioner dated January 27, 1964, executed by Jack E. Mudd—filed.

1/27 Bond of Commissioner dated January 27, 1964, in amount of $25,000.00 executed by Jack E. Mudd, as Principal, and by The Travelers Indemnity Company, as surety,—tendered by Jack E. Mudd for approval by Court.

1/30 Bond of Commissioner referred to above as tendered on 1/27/64 approved by Judge Shelbourne and filed.

2/ 3 Answers to Interrogatories on behalf of United States Steel Corp. filed.

2/13 4392-A Motion to approve appointment of Appraisal filed by Jack E. Mudd, Commissioner. Order tendered.

2/13 Oath of Acceptance of Appointment as Appraiser filed by John M. Prood, and by Allan Nash.

2/20 4392-A ORDER dated 2/20/64 approving appointment of appraiser. Copies mailed 2/20/64 to Jack E. Mudd, Commissioner, Albert F. Reutlinger, Kenneth L. Anderson and A. Scott Hamilton, Jr.

2/25 (4392-A) Order of Court dated 2/25/64 designating First National Lincoln Bank of Louisville as depository of Jack E. Mudd, Commissioner, etc. (Copies



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mailed 2/25/64 to Kenneth L. Anderson, A. Scott Hamilton, Jr., Albert F. Reutlinger, Jack E. Mudd, First Natonal Lincoln Bank of Louisvile, and Louisville Branch of Federal Reserve Bank of St. Louis.)

2/26 (4392-A) Motion filing appraisal filed with Appraisal Report. Order tendered.

2/28 (4392-A) Depository Bond dated 2/27/64 executed by First National Lincoln Bank of Louisville, with approving endorsement of Judge Shelbourne dated 2/28/64—filed.

3/10 (No. 4392-A) Order signed by Judge Shelbourne dated 3-10-64 that the Appraisal as made by the appointed Appraisers be filed and made part of this record and further that each of said Appraisers be allowed a fee for services rendered in the amt. of $200.00 each, same to be taxes as costs. Copies mailed to Jack E. Mudd, Comm., Kenneth L. Anderson, A. Scott Hamilton Jr., and Albert F. Reutlinger. Appraisal Report filed.

3/10 Order (#4392-A) signed by Judge Shelbourne dated 3-10-64 that Jack E. Mudd, Commissioner, at the foreclosure sale, which is the subject matter of this action shall use for all purposes the individual lot appraisals appearing in the Appraisal Report filed in this action; further that for the purpose of establishing the equity of redemption of Fortner Enterprises, Inc., the individual lot appraisals appearing in the Appraisal Report shall be used. Copies mailed to Jack E. Mudd, Comm., Kenneth L. Anderson, A. Scott Hamilton, Jr., and Albert F. Reutlinger.

3/13 Notice to take deposition of David Beck filed by Kenneth L. Anderson and A. Scott Hamilton.

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3/13 Notice to take depositions of Messrs. Richard C. Dyas, William H. Lang, Benjamin L. Rawlins, filed by Kenneth L. Anderson and A. Scott Hamilton.

3/16 Request for deposition subpoena as to David Beck on Mar. 19, 1964, at offices of Woodward, Hobson & Fulton, Ky. Home Life Bldg., Louisville, Ky.—filed by Kenneth Anderson, for plff. Snbpoena issued and delivered to U. S. Marshal.

3/17 (4392-A) Motion of Jack E. Mudd, Commissioner, to file Report of Sale filed. Report of Sale, with attachments, and proposed order tendered therewith.

3/18 ORDER dated 3/18/64 that the Report of Sale of the Commissioner be filed herein and made a part of this record, same to lay over for confirmation by this Court. Copies to Commissioner Mudd and Attorneys Reutlinger, Anderson and Hamilton 3/18/64.

3/18 Report of Sale filed.

3/20 Spoe. to David Beck returned executed.

4/ 4 Deposition of Richard Lee Beck filed by Pyevac, Dale & Soergel.

4/ 9 Notice and Motion (4392-A) for Order confirming sale and report of sale filed.

4/ 9 ORDER dated 4/9/64 (Judge Brooks) that the Commissioner's sale held 3/11/64, pursuant to the judgment entered herein, and the Commissioner's Report of Sale, ordered filed March 18, 1964 are hereby confirmed. Copies to Attorneys Hamilton, Anderson, Mudd, Mahan and Reutlinger.

4/14 (4392-A) Motion by Armer H. Mahan as attorney for purchaser, Robt F. Simmons and his assignee,



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Kenilworth Investment Co., Inc., (stating that purchaser, by counsel, files herein as assignment of his bid as accepted by Kenilworth Investment Co., Inc., and moves Court for entry of order confirming sale, taking credit and ordering deeds) and notice of hearing on motion at 2 P M April 17, 1964—filed. Proposed order tendered therewith. (No assignment filed or received with motion referred to above.)

4/14 Order Tendered.

4/15 (4392-A) Motion Filing Assignment of Bid—filed by Jack E. Mudd, Commissioner. "Assignment" dated 4-9-64 signed by Robt F. Simmons, Assignor, and Kenilworth Investment Co., Inc., Assignee, and proposed order tendered therewith.

4/15 (4392-A) Motion Noting Deposit and Filing Sale Bond—filed by Jack E. Mudd, Commissioner. "Bond" in amount of $83,294.96 executed by Kenilworth Investment Co., Inc., and Reliance Ins. Co., and proposed order tendered therewith.

4/16 (4392-A) ORDER dated 4/16/64 noting deposit and filing sale bond (Judge Brooks).

4/16 (4392-A) ORDER (Judge Brooks) dated 4/16/64 filing assignment of bid. Copies both to Messrs. Mudd, Reutlinger, Anderson, Hamilton and Mahan.

4/16 ORDER (Agreed) Judge Brooks dated 4/16/64 that certain described documents should be produced by the respective witnesses having custody of same. Copies to Attorneys Anderson and Reutlinger.

4/18 ORDER dated 4/17/64 that (1) the report of sale held 3/11/64 is hereby confirmed;(2) The assignment of the bid of Robert F. Simmons to Kenilworth Investment Co., Inc. is approved and the term "pur-

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chaser" is referred to the assignee; (3) The purchaser be given credit for the amounts set forth together with execution of bond in accordance with the term of sale, and; (4) Kenilworth Investment Co., Inc., having complied with terms of sale, J. E. Mudd, Commissioner, shall execute three described deeds conveying to Kenilworth Investment Company, Inc., purchaser, the property described therein in accordance with the judgment rendered subject to the conditions set forth in the sale bill attached to the report of sale. Copies 4/18/64 to Armer H. Mahan and J. E. Mudd.

4/21 Copies of order entered 4/18/64 mailed to Kenneth L. Anderson, A. Scott Hamilton, Jr., and Albert F. Reutlinger.

4/23 Notice to take deposition of David H. Boyd, at the offices of Woodward, Hobson & Fulton, Ky. Home Life Bldg., Louisville, Ky. at 10 am 4/29/64 filed by plaintiff.

5/ 1 (4392-A) Motion to Execute and Approve Deeds—filed by Jack E. Mudd, Commissioner.

5/ 1 (4392-A) Order Approving Deeds of Commissioner, signed by Judge Shelbourne May 1, 1964, providing: That 3 deeds produced and executed in open Court by Jack E. Mudd, Commissioner, on behalf of grantors therein, conveying property described therein to Kenilworth Investment Company, Inc., copies of which are filed with the order, be approved as executed by the Commisioner; that the Court affixed its approving signature thereto; that the Clerk of the U. S. District Court is directed to certify said deeds to the Clerk of the Jefferson County Court for record; that the deeds be delivered to Jack E. Mudd, Commissioner, for delivery to the purchaser. Copies to J. E. Mudd, Comm. and to Attorneys Mahan, Reutlinger, Anderson and Hamilton 5/1/64.



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5/ 1 (4392-A) Originals of 3 deeds, each dated May 1, 1964, between Fortner Enterprises, Inc., a corporation, and U. S. Steel Homes Credit Corporation, a corporation, Parties of the First Part, all by Jack E. Mudd, Commissioner, and Kenilworth Investment Company, Inc., a corporation, Party of the Second Part, with approving signature of Judge Roy M. Shelbourne thereon and certification by the Clerk of the U. S. District Court to the Jefferson County Court Clerk for record, delivered by the Clerk U. S. District Court to Jack E. Mudd, Commissioner, pursuant to the order of Court dated 5/1/64 referred to above. Conformed copes of said deeds filed herein.

5/ 6 Transcript of Proceedings (5/1/64) filed by Helen M. Whedon, Court Reporter.

5/11 Depositions of William H. Lang, Benjamin L. Rawlins and Richard C. Dyas filed by Adler Reporting Service.

6/ 4 (4392-A) Receipt of payment of Bond filed.

6/ 4 (4392-A) ORDER TENDERED cancelling Bond and Releasing Lien.

6/ 8 ORDER dated 6/8/64 cancelling bond and releasing lien. Copies to Armer H. Mahan, Albert F. Reutlinger, Kenneth L. Anderson, A. Scott Hamilton and Jack E. Mudd.

6/12 4392-A Motion noting of record release of lien and cancelling bond of Kenilworth Investment Co., Inc. filed by Jack E. Mudd, Commissioner.

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6/12 ORDER dated 6/12/64 noting of record release of lien and cancelling bond of Keniworth Investment Co., Inc. Copies to counsel of record.

6/12 Motion noting deposit and filing sale bond filed by J. E. Mudd, Commissioner. Order and Bond tendered.

6/12 Motion for entry of order confirming sale, taking credit and ordering deed as set forth filed by J. E. Rose, attorney for purchaser Richard K. Fenley Corp. Order tendered. Notice of hearing 5/12/64 filed.

6/23 Motion to Execute and Approve Deed (No. 4392-A) filed by Jack E. Mudd, Commissioner.

6/23 (No. 4392-A) Order (Judge Shelbourne) dated 6/22/64, on motion of Jack E. Mudd, Commissioner, that the deposit of the sum of $8,626.80 with the Commissioner in his account with the First National Lincoln Bank, Louisville Ky., be noted of record herein subject to further order of the Court; that Sale Bond dated June 10, 1964, as executed by Richard K. Fenley Corporation, with surety, in the amt. of $29,000 payable 18 months from date thereof with interest thereon at 6% per annum from March 11, 1964, date of sale, same to be secured by lien on property to be conveyed to said purchaser, be filed and made a part of this record. Said bond (which is attached to said order) filed.

6/23 (4392-A) Order dated 6/22/64 that (1) the report of sale held 3/11/64 be confirmed; (2) the purchaser be given credit for the amounts set together with execution of bond in accordance with the term of sale and Richard K. Fenley Corporation having complied with the terms of sale, Jack E. Mudd,



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Commissioner, execute the described deed conveying to Richard K. Fenley Corporation, purchaser, the property described therein in accordance with the Judgment heretofore rendered subject to the condition set forth in the Sale Bill attached to the Report Sale.

6/23 (4392-A) Order dated 6/23/64, that Jack E. Mudd, Commissioner, having appeared in open Court and produced and executed a deed on behalf of grantors therein conveying the property as described to Richard K. Fenley Corporation, a copy of said deed being filed herewith, etc., that said deed is approved as executed by the Commissioner, wherefore this Court affixed its approving signature and the Clerk of this Court is directed to certify said deed to the Clerk of the Jefferson County Court for record and that the deed be delivered to Jack E. Mudd, Commissioner, for delivery to purchaser. Copies to

6/23 Original deed dated June 23, 1964, between Fortner Enterprises, Inc. a corporation, and U. S. STEEL HOMES CREDIT CORPORATION, a corporation, parties of the first part, all by Jack E. Mudd, Commissioner, and Richard K. Fenley Corporation, party of the second part, with approving signature of Judge Roy M. Shelbourne thereon and certification by the Clerk of the U. S. District Court to the Jefferson County Court Clerk for record, delivered to Jack E. Mudd, Commissioner, by Clerk U. S. District Court pursuant to order dated June 23, 1964. Photocopy of said deed filed.

6/24 Copies of three orders entered 6/23/64 mailed to A. Scott Hamilton, Jr., J. E. Rose, Jack E. Mudd, Armer H. Mahan, Albert F. Reutlinger and Kenneth L. Anderson.

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Deposition of David H. Boyd, taken by Plaintiff, filed by L. Dale Fadden, Court Reporter.

7/ 3 4329-A Motion of Jack E. Mudd, Commissioner, to executed and approved deed filed.

7/ 3 4392-A Motion of Jack E. Mudd, Commissioner, to note of record that he has received a check in the amount of $30,361.67 from Richard K. Fenley Corp. in payment of sale bond executed by said purchaser, and that said sum has been deposited with 1st National Lincoln Bank of Louisville, depository of the Commissioner, subject to further order of Court filed.

7/23 4392-A Order of Court signed by Judge Brooks on 7-23-64, that payment by Richard K. Fenley Corp. of sum of $31,361.67 by check to Commissioner in payment of sale bond, and deposit thereof with 1st National Lincoln Bank of Louisville, depository of Commissioner, be noted of record subject to further order of Court. Copies to A. Scott Hamilton, Jr., J. E. Rose, Jack E. Mudd, Armer H. Mahan, Albert F. Reutlinger and Kenneth L. Anderson.

7/23 4392-A Order of Court signed by Judge Brooks 7-23-64, correcting description of Lots 332, 333, and 334 as set out in Group 2 of paragraph 3 of Sale Bill attached to Report of Sale and providing that Commissioner executed deed thereto to Richard K. Fenley Corp. conveying property in fee simple free and clear of all encumbrances except state, county and school taxes payable in years 1962, 1963 and 1964 and all taxes thereafter. Copies to A. Scott Hamilton, Jr., J. E. Rose, Jack E. Mudd, Armer H. Mahan, Albert F. Reutlinger, Kenneth L. Anderson.



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7/23 4392-A Order of Court signed by Judge Brooks July 23, 1964, that purchase money bond executed by Richard K. Fenley Corp. June 10, 1964, and filed in this Court June 12, 1964, be and is hereby canceled and held for naught, and Jack E. Mudd, Commissioner, is ordered to cancel said bond and to release the lien retained in deed dated June 23, 1964, of record in Deed Book 3900 page 284 in Jefferson County, Ky., Clerk's Office, Receipt of Jack E. Mudd, Commissioner, for check received from Richard K. Fenley Corp. in amount of $30,361.67, in payment of bond with interest, attached to above order. Copies to A. Scott Hamilton, Jr., J. E. Rose, Jack E. Mudd, Amer H. Mahan, Albert F. Reutlinger and Kenneth L. Anderson.

7/23 4392-A Order of Court signed by Judge Brooks 7-23-64, providing: That deed produced and executed in open Court by Jack E. Mudd, Commissioner, on behalf of grantors therein conveying property described therein to Richard K. Fenley Corp., a copy of which is filed with the order, he approved as executed by the Commissioner; that the Court affixed its approving signature thereto; that the Clerk of this Court is directed to certify said deed to the Clerk of the Jefferson Cricuit Court for record; that the deed be delivered to Jack E. Mudd, Commissioner for delivery to the purchaser. Copies to A. Scott Hamilton, Jr., J. E. Rose, Jack E. Mudd, Armer H. Mahan, Albert F. Reutlinger and Kenneth L. Anderson.

7/23 #4392-A Original of deed dated July 23, 1964, between Fortner Enterprises, Inc., a corporation, and U. S. Steel Homes Credit Corp., a corporation, par-

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ties of the first part, all by Jack E. Mudd, Commissioner, and Richard K. Fenley Corp., party of the second part, with approving signature of Judge Henry L. Brooks thereon and certified by Clerk of U. S. District Court to Jefferson County Court Clerk for record, delivered by the Clerk, U. S. District Court to Jack E. Mudd, Commissioner, pursuant to the order of Court dated July 23, 1964, referred to above. Conformed copy of said deed filed herein.

8/27 ORDER dated 8/27/64 setting PTConf 9/8/64 at 9:30 am. Copies to Attorneys Anderson, Hamilton and Reutlinger.

9/ 3 (4392-A) Notice, Motion and Affidavit for Fee filed by Jack E. Mudd, Commissioner for hearing at pretrial conference 9/8/64 at 9:30 am.

9/ 8 ORDER (PTConf held 9/8/64) dated 9/8/64—continuing until further order of Court of notice of counsel. Copies to Attorneys Anderson, Hamilton and Reutlinger.

9/16 (#4392-A) "Motion Filing Record of Deposits" with deposit slips attached—filed by Jack E. Mudd, Commissioner.

9/16 (#4392-A) Motion of defendant to enter order withdrawing funds in the hands of the Commissioner—filed by Albert Reutlinger, atty. for defendant U. S. Steel Homes Credit Corp. Proposed order tendered therewith.

9/21 (4392-A) ORDER dated 9/18/64 that (1) Deposit slips are made a part of this record (2) J. E. Mudd, Commissioner distribute the funds in his hands as set out, and (3) discharging commissioner and his surety after evidence of above payments has been



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filed with the Court. Copies to Albert F. Reutlinger, Jack E. Mudd, Kenneth L. Anderson and A. Scott Hamilton, Jr.

9/21 Depositions of Andrew Cowart, Harry R. Black, Meredith Russell Moreillon, Edward L. Akers, Neil G. Day, Wililam L. Rollins and Stanley J. Mack filed. Envelope of exhibits filed with Mack deposition.

12/ 7 (A) Motion filing cancelled checks, bank statements, releasing Commissioner and depositary and surety on bonds filed by Jack E. Mudd, Commissioner.

12/ 7 (A) Notice and motion to release commissioner, and depositary and surety on bonds filed by Jack E. Mudd, Commissioner.

12/17 ORDER dated 12/17/64 three named cancelled checks totaling $208,562.69, dated September 22, 1964, and issued by Jack E. Mudd, Commissioner, on the First National Lincoln Bank of Louisville, Kentucky, depositary, representing disbursement of all funds coming into his hands as Commissioner herein in accordance with an order entered herein on 9/18/64, togther with bank statement, showing there are now no funds remaining with First National Lincoln Bank as depositary, are filed and made a part of the record, and (2) that Jack E. Mudd is discharged from all further obligations as Commissioner herein, and that he and surety on his bond as Commissioner, are released from all further obligations by reason thereof.

12/17 ORDER dated 12/17/64 releasing depositary bond and security pledged in lieu of surety. Copies to attorneys Mudd, Anderson, Hamilton, Reutlinger.

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1/15 (1) Motion for Production of Documents filed by Plaintiff.

1/15 Motion to assign for Trial filed by Plaintiff.

5/12 A Request for execution and Affidavit of Albert F. Reutlinger filed.

5/12 A Writ of fieri facias dated 5-12-65 against Fortner Enterprises, Inc., in favor of U. S. Steel Homes Credit Corporation in amount of $88,733.60, issued. Original and 3 copies delivered to U. S. Marshal.

5/14 A Writ of Fieri Facias returned executed.

8/31 ORDER dated 8/31/65 transferring to docket of Judge Gordon.

8/31 ORDER dated 8/31/65 setting PTCConf 9/21/65 at 11 am. Copies to Attorneys Anderson, Hamilton, Reutlinger and Mahan. (Both orders)

9/10 ORDER (AGREED) dated 9/10/65 continuing pre-trial conference to 9/28/65 at 11 am. Copies to Attorneys Anderson and Reutlinger.

9/30 Order signed by Judge Gordon on 9-30-65—That def. will proceed forthwith for total and complete discovery of all phases of this action, that on Oct. 15, 1965 at 2 p.m. Court will hear motion of def. to separate questions of liability from allegations for damages in this action and Defs.' motion for bond for costs and any other motions as are presented to Court. Parties will prepare memoranda of Authority for all motions made by them or responses made thereto. Further ordered that at hearing, Court will set a day certain for trial of this action. Copies to Kenneth L. Anderson, A. Scott Hamilton, Jr. and Albert F. Reutlinger.

10/ 8 Memorandum in support of a motion to require plaintiff to execute a cost bond and a motion to



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have the Court separate trial of the issue of liability from the assessment of damages.

10/13 Memorandum in opposition to Defendant's Motion for Bond for costs, Motion to separate liability and assessment of damages—filed by Plaintiff.

10/15 MOTION for Cost Bond filed by Defendants.

10/15 Motion to separate the issue of liability from the issue of damages filed by Defendant.

10/18 ORDER dated 10/18/65 that (1) Defendants motion for cost bond SUSTAINED, (2) Defendants' motion to separate the issue of liability from the issue of damages OVERRULED, however plaintiff is directed that the Court will require that Plff. offer its proof in the order of (a) conspiracy, (b) fact of damage, and (c) proof of actual damage suffered, any deviation from said order of proof to be upon motion and usual pre-trial order as to damages (special), witneses etc. Copies to Attorneys Anderson, Hamilton and Reutlinger. Jury Trial 2/14/66.

12/ 2 Bond for Costs, dated 10/21/65, in the amount of $500.00, executed by Fortner Enterprises, Inc. and Western Surety Company, with approving endorsement of Judge Gordon, dated 12/2/65, thereon, as follows: This bond satisfactory for costs herein subject to any further order of the Court.

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1/21 Motion to quash taking of deposition of A. B. Fortner, Jr. filed by Plaintiff.

1/21 ORDER dated 1/21/66 that the deposition of A. B. Fortner, Jr., noticed for 1/28/66 is quashed. Copies to Attorneys Anderson, Hamilton and Reutlinger.

1/21 Motion to file amended complaint filed by plaintiff.

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1/21 ORDER dated 1/21/66 sustaining motion to amend. Copies to Attorneys Anderson, Hamilton and Reutlinger.

1/21 Amended Complaint filed, with Exhibits.

1/21 ORDER dated 1/21/66 reassigning jury trial to 7/6/66. Copies to Attorneys Anderson, Hamilton and Reutlinger.

5/23 Answer to Amended Complaint filed by A. F. Reutlinger for defts.

6/ 7 ORDER dated 6/7/66 continuing hearing set 6/17/66 to 7/6/66 at 9:30 am. Copies to Attorneys Anderson, Hamilton and Reutlinger.

6/ 7 Motion to dismiss amended complaint, or strike pars. 2, 3, 4, 5, and 6 of said complaint and motion to dismiss par. 4, subparagraph (g) of pars. 5 and 6 of amended complaint, etc., with notice of hearing on Friday, June 17, 1966 at 10:30 AM. Memorandum of Authority in support—filed by Albert F. Reutlinger, atty. for defs.
(Note: see above 6-7 continuing hearing.)

6/15 Praecipe for spoes. to Mack, Black, Day, Moreillon, Akers, Cowart and Rollins filed by Plaintiff. Spoes. issued and delivered to U. S. Marshal.

6/21 Request for Issuance of Subpoenas as to A. W. Edmondson, John Cooper, Howard Bolin, Herman Miles, Wilbur Powell, J. Ed Mudd, A. B. McCulloch, and Stratton O. Hammon, to testify at trial on July 7, 1966 at 9:30 a.m. in behalf of Plaintiff—filed. Spoes. issued and delivered to Marshal 6/21/66.

6/22 Subpoena directed to John Cooper, returned as executed on 6-21-66.

6/22 "Memorandum in Compliance with the Court's Pre-Trial Order Concerning Witnesses and Exhibits"—



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filed by Albert F. Reutlinger, Attorney for Defendants.

6/23 Subpoena returned as executed for Mr. A. B. McCulloch on June 22, 1966 by U. S. Marshal.

6/23 Request for issuance of 3 subpoenas in blank filed by Albert Reutlinger, Atty for Defs. Spoes. issued and delivered to Marshal.

6/24 Spoe. returned as exectued as to A. W. Edmondson.

6/24 Spoe. returned as executed as to Edwin D. Horn.

6/24 Spoe returned as executed as to J. Ed Mudd and spoe. returned as executed as to A. B. Fortner, Jr.

6/24 Request for issuance of spoes. as to Robt. E. Robinson, Earl E. Smith, Roscoe Dalton, Paul Semonin, Hal Thomas, Ed Anschutz, Al Fleig, Edward Horn, Allan Nash, John Prood, and Michael Atlas—filed. Spoes. issued and delivered to Marhsal 6/24/66.

6/25 Defts.' Motion for Summary Judgment filed, with Memorandum of Authority in Support of Motion, Notice for hearing Med. July 6, 1966, 9:30 a.m.—filed.

6/25 Affidavits of W. L. Rollins, Harry R. Black, Richard K. Harb, and Innes W. Dobbins, Jr., in support of deft.'s motion for summary judgment—filed.

6/28 Spoes. returned as executed as to Herman R. Miles, Stratton O. Hammon, Herman R. Miles, Roscoe Dalton, Hal Thomas, Edward Horn, and Allan Nash.

6/28 Spoes. returned as executed as to Paul Semonin, John Prood, Al Flieg, and Earl E. Smith.

6/29 Request for Issuance of Subpoenas for John King, L. E. Gardner, Stephen C. McCoy Charles Welch, Richard K. Harb and Innes W. Dobbins, Jr. filed by Albert Reutlinger. Subpoenas signed, sealed and

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delivered to U. S. Marshal with checks made payable to witnesses in sum of $4.00 each.

6/29 Spoes. returned as executed as to Wilbur Powell, Ed Anschutz, Robert E. Robinson.

6/30 Spoes. returned as executed as to Stephen C. McCoy, Charles Welch and Innes W. Dobbins, Jr.

6/30 Plaintiff's Tendered Instructions filed.

7/ 1 Supplementary memorandum on motion for summary judgment filed by Defendants.

7/ 1 Objections to exhibits tendered by plaintiff pursuant to pre-trial order filed by defendants.

7/ 5 Plaintiff's memorandum in response to defendant's motion for summary judgment filed, with Affidavits of A. B. Fortner, Jr. (with attachments) and Edwin D. Horn.

7/ 6 Amended Answer tendered by Defendants—NOT filed.

7/ 6 Affidavit of Albert F. Reutlinger filed by Defendants.

7/ 6 Spoes. returned executed: Andrew Cowart, Howard Bolin, L. E. Gardner, John King, Richard K. Harb, William R. Rollins, Edward L. Akers, Neil G. Day, Harry R. Black, Stanley J. Mack.

7/ 8 ORDER dated 7/7/66—hearing held 7/6/66—defendants' motion for summary judgment sustained, counsel to prepare and tender FF/CL, and noting filing and tendering by defendants of affidavit and amended answer (tendered only). Copies to Attorneys Anderson, Hamilton and Reutlinger.

7/11 ORDER dated 7/11/66 setting aside order dated 7/7/66. Copies to Attorneys Anderson, Hamilton and Reutlinger.



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7/11 Spoe. to Michael Atlas returned unexecuted.

7/12 ORDER tendered by Plaintiff.

7/13 Spoe. to M. R. Moreillon returned executed.

7/15 Plaintiff's Motion to enter order filing Affidavit and attachments thereto of Kenneth L. Anderson and the Affidavit of Herman Miles—filed.

7/15 Affidavit of Herman Miles and Affidavit of Kenneth L. Anderson w/attachments tendered.

7/21 Findings of Fact and Conclusions of Law tendered by Defendants.

9/ 7 MEMORANDUM OPINION dated 9/7/66 that plaintiff's motion to have the affidavits of Kenneth L. Anderson and Herman Miles filed is overruled. They may be tendered (2) Defendant's motion to have the Court order its amended answer tendered 7/6/66 filed of record is overruled. No order is entered on other pending motions, except on defendants' motion for summary judgment. This motion for summary judgment is sustained, and the complaint and the amended complaint are dismissed, plaintiff to pay all costs.

9/ 9 JUDGMENT dated 9/8/66 dismissing the complaint and amended complaint at cost of plaintiff. Copies mailed to Attorneys Anderson, Hamilton and Reutlinger.

9/ 9 Copies of memorandum opinion entered 9/7/66 mailed to Attorneys Anderson, Hamilton and Reutlinger.

9/16 Plaintiff's motion that Court modify its opinion and set aside its order of 9/7/66 and to set aside the Memo. Opinion and Judgment Dismissing Complaint and Amended Complaint entered 9/7/66 and

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the Judgment entered on 9/8/66 and to reconsider Court's ruling on defts.' motion for summary judgment and set aside the sustaining of same—filed, with notice of hearing on September 30, 1966, at 2:00 p.m. Order tendered.

9/16 Affidavit of Kenneth L. Anderson dated Sept. 16, 1966, with attachments, filed.

9/16 Affidavit of A. Scott Hamilton, dated September 13, 1966, with attachments, filed.

9/16 Affidavit of Kenneth L. Anderson dated September 15, 1966, with attachments, filed.

9/16 Memorandum of Authorities on Plaintiff's Motions —filed.

9/28 Memorandum filed by Defendants with Affidavit of Albert F. Reutlinger.

10/ 5 ORDER dated 10/5/66 that (1) Affidavit of Kenneth Anderson dated 7/15/66, and attached documents, and affidavit of Herman Miles dated 7/14/55, and attached documents, are filed of record, and to the extent necessary the Court's memorandum opinion entered 9/7/66 is so modified. (2) Plaintiff's motion to set aside memorandum opinion and judgment dismissing complaint and amended complaint and to reconsider Court's ruling on defendants' motion for summary judgment—is OVERRULED. Copies to Attorneys Sandidge and Anderson and Reutlinger.

10/ 5 Affidavit of Kenneth L. Anderson that was tendered July 15, 1966, and attachments in folders marked I through IX tendered July 15, 1966—filed pursuant to order of Court dated Oct. 5, 1966, referred to above.



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10/ 5 Affidavit of Herman Miles with attachments that was tendered July 15, 1966—filed pursuant to order of Court dated Oct. 5, 1966, referred to above.

10/ 6 Notice of Appeal by Fortner Enterprises, Inc., to U. S. Court of Appeals for 6th Circuit—filed. Copies mailed to Albert F. Reutlinger and Armer H. Mahan same date.

10/ 6 Appeal bond in amt. of $250.00, dated Oct. 6, 1966, executed by Fortner Enterprises, Inc. (by Kenneth L. Anderson, its attorney) and by Fidelity & Deposit Company of Maryland—filed.

10/21 Copy of notice of appeal mailed to Mr. J. E. Rose, atty., 116 So. 5th Street, Louisville, Ky.

10/28 (4392-A) Request for Writ of Attachment against Louisville Gas & Electric Co.—filed by Mr. Reutlinger, atty. for U. S. Steel Homes Credit Corporation.

10/28 (4392-A) Affidavit of Albert F. Reutlinger dated Oct. 28, 1966—filed by Mr. Reutlinger.

10/28 (4392-A) Order of Attachment—On Affidavit, with Louisville Gas & Electric Company named as garnishee, in amount of $54,408.45 plus interest at the rate of 6% per annum from March 12, 1964, issued by Clerk. Original and 3 copies delivered to Marshal. (This order of attachment in favor of U. S. Steel Homes Credit Corporation on its judgment dated March 12, 1964.)

11/ 2 4392-A Order of Attachment—on Affidavit returned as executed on 20-28-66 and 11-1-66.

11/ 7 (4392, 4392-A) Record on appeal mailed to Clerk U. S. Court of Appeals 6th Cir.

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11/10 (4392, 4392-A) Received from Clerk U. S. Court of Appeals for 6th Cir. receipt for record on appeal showing same filed and appeal docketed in that Court on Nov. 9, 1966, as appeal No. 17546.

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5/ 5 Opinion and Judgment of Supreme Court of the United States received and filed. Judgment states in part as follows: "On Consideration Whereof, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed with costs; . . . and that this cause be and the same is hereby, remanded to the United States District Court for the Western District of Kentucky for further proceedings in conformity with the opinion of this Court. It is further ordered that the said petitioner, Fortner Enterprises, Inc. recover from the United States Steel Corp., et al., One Thousand and One Hundred and Seventy-four Dollars and Ninety-five Cents ($1,174.95) for their costs herein expended. Kenneth L. Anderson, A. Scott Hamilton, Jr., Albert F. Reutlinger and Armer H. Mahan notified of filing.

5/ 7 Copy of Judgment of U. S. Court of Appeals for Sixth Circuit received and filed. Judgment states in part as follows: "It is hereby ordered, adjudged and decreed that the judgment of the District Court be and is hereby affirmed for the reasons set forth in the memorandum opinion of Judge James F. Gordon."

6/11 Record on Appeal reached from Clerk, U. S. Court of Appeals for Sixth Circuit. Receipt therefor mailed.



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7/11 Order signed by Judge Gordon that this matter came on for a pre-trial hearing on July 1, 1969. This case is set for trial to a jury June 1, 1970. The parties indicated and discussed certain pleas and the question of a split trial which matters are to be briefed by parties on a schedule to be agreed to between them. The Court denied the requirement that the defendant pay in the cost upon the theory that the defendant held a deficiency judgment against this plaintiff, and the result from a mortgage foreclosure. Copies to Kenneth L. Anderson, A. Scott Hamilton, and Albert F. Reutlinger.

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1/ 7 Motion for judgment on the pleadings w/memo. in support thereof and letter requesting hearing on same filed by deft.

1/ 7 ORDER signed by Judge Gordon: hearing on motion set for 2/25/70 at 1:30 p.m.; cys to counsel.

1/16 Motion to be allowed to file memorandum in response to defdts' motion for judgment on the pleadings through 2/6/70—by Kenneth L. Anderson.

2/ 5 Motion to file second amended complaint filed by plaintiff, noticed for hearing 2/25/70 at 1:30 p.m., w/memo. in support thereof.

2/ 5 Memo. on behalf of plaintiff in opposition to motion for judgment on the pleadings filed.

2/27 ORDER on Pre-trial conference signed by Judge Gordon: motion to strike part of amended complaint re second contract overruled; pff.'s motion to file 2nd amd. comp., taken under advisement since it would require trial continuance to defdt; agreed that exchange of witnesses and exhibits shall be; made by 4/1/70, all discovery completed by 5/1/70,

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further pre-trial set for 5/18/70; Court to hear counsel on 3/18 on question of split trial. Cys. to Messrs. Anderson, Hamilton, Reutlinger and Buchanan.

3/ 6 Notice of Motion filed by Mr. Reutlinger: Motion to Separate Trial filed; Memo. in support filed, for 3/18/70.

3/19 Interrogatories Propounded to the Plaintiff in Accordance with Rule 33 of the Federal Rules of Civil procedure, filed by Mr. Reutlinger.

4/ 1 Witnesses and Exhibits for plaintiff filed by Mr. Anderson per pre-trial order.

4/ 1 Memorandum in Compliance with the Court's Pre-trial Order concerning Witnesses and Exhibits filed by Mr. Reutlinger.

4/ 3 Notice to take depositions of A. B. Fortner, Jr., Herman R. Miles and Edwin D. Horn filed by defendants. Spoes. issued and handed to Mr. Reutlinger 4/3/70.

4/ 6 Answers to interrogatories filed by Mr. Anderson.

4/ 6 Memorandum in opposition to motion to sever filed by Mr. Anderson.

4/ 8 Interrogatory to defendants filed by Ken Anderson; Notice to take deposition of Forest Stump, Wallace Myers and Eugene McIndoe filed by Ken Anderson.

4/ 8 Depo. spoe. returned executed as to Edwin D. Horn and Herman R. Miles.

4/ 9 Motion for Court to order ptff. to respond to Interrogatories 1, 2 and 3, filed by Mr. Reutlinger.

4/16 Deposition spoe. returned executed on 4-16-70 as to A. B. Fortner.



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4/23 Answers to Interrogatories filed by Albert F. Reutlinger.

4/29 Request for Admissions to U. S. Steel Homes Credit Corp. filed by Kenneth L. Anderson.

4/29 Request for Admissions to United States Steel Corporation filed by Kenneth L. Anderson.

5/ 8 Response to Request for Admissions on behalf of U. S. Steel Corp., filed.

5/12 Motion to Elect Theory of Monetary Recovery filed by Mr. Reutlinger, with Memorandum in support thereof.

5/14 Plaintiffs response to motion to elect theory of monetary recovery filed.

5/18 ORDER signed by Judge Gordon on 5/18 pre-trial: Mr. Reutlinger advised Court that he wished to withdraw his motion to separate trial on liability from trial on damages and his motion relative to answering by plaintiff of interrogatories served upon plaintiff by him, as he had taken depo. of Mr. Fortner. ORDER that defendants' motion to require plainitff to elect whether it will pursue claim for monetary damage set forth in par. 5 D of amended complaint or pursue claim for monetary damage set forth in par. 5 G of amended complaint, is OVERRULED. Agreed that jurors would not report on 6/1/70, first day of trial, this day being reserved for certain preliminaries, such as introduction into evidence of exhibits, etc., and that jurors would report and jury would be impaneled on 6/2/70. Cys. to Messrs. Anderson, Hamilton, Reutlinger, and Henlein.

5/21 Subpoenaes to testify on behalf of plaintiff in trial on 6/2/70 returned by Marshal: Howard Bolin served 5/20/70; John Cooper served 5/20/70.

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5/25 Returns on subpoenaes to testify on behalf of plaintiff on 6/2/70 filed by Marshal: Stanley J. Mack served 5/22/70; Edward L. Akers served 5/22/70; Harry R. Black served 5/22/70; Herman Miles served 5/21/70; A. B. McCullouch served 5/21/70; Paul Semonin served 5/21/70; Hal Thomas served 5/21/70; Ed Anschutz served 5/21/70; Edward Horn served 5/21/70.

5/25 Returns on subpoenaes to testify on behalf of defendants on 6/1/70 filed by Marshal: Innes W. Dobbins, Jr., and Edwin D. Horn served 5/21/70.

5/27 Return on subpoena to testify on behalf of plaintiff on 6/2/70, at 9:30 a.m., returned by Marshal: Wilbur Powell served 5/26/70.

5/28 Subpoenaes to testify on 6/2/70 on behalf of plaintiff returned: Al Fleig served 5/27/70; Robert E. Robinson served 5/27/70; Earl E. Smith served 5/27/70; John Prood served 5/26/70; Allan Nash served 5/26/70; William R. Rollins served 5/25/70; Meredith E. Moreillon served 5/25/70; Neil G. Day served 5/25/70; Andrew Cowart served 5/25/70; Stratton O. Hammon (SUBPOENAED FOR 6/4/70) served 5/25/70.

5/28 Subpoenaes to testify on 6/1/70 on behalf of defendants returned.: Herman Miles served 5/27/70; John R. Carpenter served 5/27/70; John E. Kennedy served 5/25/70; A. B. Fortner, Jr., served 5/26/70; John D. Cooper, Jr., C.P.A., served 5/25/70.

5/28 Spoes. returned as executed as to Clifford Knopf and Roscoe Dalton.

6/ 2 Deposition of A. B. Fortner, Jr., taken by the defendants filed by Theodore R. Rhode, Reporter.



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6/25 "Proposed Instructions to the Jury Tendered by the Defendants" tendered.

6/25 "Proposed Instructions to the Jury on Section Two of the Sherman Act, Tendered by the Defendants" tendered.

6/25 Plaintiff's Motion for Directed Verdict on issues of liability filed.

6/29 Plaintiff's Tendered Instructions filed.

6/29 Depositions of Eugene P. McIndoe, Forest J. Stump and Wallace R. Myers filed.

6/29 Partial Transcript of Proceedings filed by Charles L. Sterling, Official Reporter.

6/29 Jury verdict as follows signed in open court pursuant to direction of Court on trial begun 6/1/70:

"We the Jury, pursuant to the direction of the Court, find for the plaintiff on the issues of liability under the provisions of the antitrust laws applicable to this case.

/s/ Marion E. Johnson,
June 29, 1970 Foreman"

6/29 Following note from jury received by Judge Gordon during jury deliberation:

"Judge Gordon

If it would not be out of order, would it be possible for you to read to the jury, your statements as you did before we went to the jury room; We have a hang up and I believe this might clear the air.

/s/ Mr. Hubrich"

6/30 Jury verdict as follows returned in open court on trial begun 6/1/70:

1970

"We, the Jury, find for the plaintiff on the issue of damages and award it the sum of $93,200.00.

/s/ Leroy J. Hubrich,

June 30, 1970 Foreman"

7/ 7 Trial Order signed by Judge Gordon reflecting Jury verdict above and note from Jury above. Copies to Messrs. Anderson & Reutlinger.

7/ 7 Motion for judgment notwithstanding the verdict filed by deft.

7/ 7 Motion for New Trial by deft.

7/16 Agreed Order by Judge Gordon that exhibits of pff. Nos. 38, 39, 44, 45, 52, 56, 57 and 58 may be withdrawn by counsel for safekeeping during further pendency of action. Copies to Messrs. Anderson, Hamilton & Reutlinger.

8/31 ORDER s[illegible] by Judge Gordon OVERRULING defendants' motion for judgment notwithstanding the verdict and motion for new trial. Copies to Messrs. Anderson, Hamilton, and Reutlinger.

9/15 Motion for award of attorneys fees filed by Mr. Anderson w/Joint Affidavit of Kenneth Anderson and A. Scott Hamilton; Bill of Costs tendered by Mr. Anderson, noticed by him for hearing before COURT on 9/18 at 2:00 p.m., w/attachments; Judgment tendered.

9/18 Affidavit of Albert F. Reutlinger filed.

11/23 Judgment order signed by Judge Gordon that: the plaintiff have judgment against dft. U. S. Steel Corp., and U. S. Steel Homes Credit Corp., jointly and severally in sum of treble $93,200.00 or total or $279,600.00, with interest thereon at 6% per annum from Sept. 18, 1970 until paid; that plft., have judgment against dfts. for reasonable attorney's fees of $140,000.00 with interest thereon at 6% per annum from Sept. 18, in the amount of $7,416.75 with interest of 6% per annum from Sept. 18, 1970 until paid; that this is final Judgment, there being no just cause for delay. Copies to counsel of record.



1970

12- 3 Supersedeas Bond in the sum of $485,000.00 with U. S. Steel Corp. and U. S. Steel Homes Credit Corp. as principal, and Federal Insurance Co., as surety, with approval of Judge James F. Gordon filed.

12/21 Notice of Appeal to U. S. Court of Appeals for the Sixth Circiut filed by Albert F. Reutlinger. Copy mailed to Kenneth L. Anderson.

12/21 Order for Transcript filed by Albert F. Reutlinger.

1971

1/25 Notice to make motion and tender affidavit at 1:00 P.M. Jan. 27, 1971, Motion, and Affidavit of Albert Reutlinger filed. Order tendered.

1/27 Order signed by Judge Gordon 1-27-71—time within which Clerk may submit record on appeal to U. S. Court of Appeals for Sixth Circuit extended by an additional 50 days. Copies to Kenneth L. Anderson and Albert F. Reutlinger.

3/11 Transcript of Proceedings (17 volumes) filed by Charles Lee Sterling, Official Court Reporter.

**COMPLAINT**—Filed July 19, 1962.

Fortner Enterprises, Inc. brings this action against the defendants named herein and complains and alleges as follows:

## I

## JURISDICTION AND VENUE

1. This Complaint is filed and these proceedings are instituted against the above named defendants under Sections 4 and 16 of the Act of Congress of October 15, 1914, ch. 323, 38 Stat. 731, and 737, 15 U. S. Code, Sec. 14 and 26, as amended, commonly called the Clayton Act, to recover damages arising out of and to prevent, restrain and enjoin continuing violations by the above named defendants of Sections 1 and 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. Each of the defendants, United States Steel Corporation; and United States Steel Homes Credit Coporation tranacts business and is found within the Western District of Kentucky.

3. Plaintiff, Fortner Enterprises, Inc., is now and was at all times mentioned herein a corporation incorporated under the laws of Kentucky with its chief place of business in Louisville, Jefferson County, Kentucky, said business being that of the development of subdivision properties and the sale of real estate and improvements thereon.

## II

## DEFINITIONS

4. Whenever used in this Complaint, the terms:

(a) United States Steel Homes means single family prefabricated dwellings consisting primarily of com-



ponents produced and furnished by United States Steel Homes Division, United States Steel Corporation.

(b) Prefabricated dwellings are houses with the basic component parts fabricated and intended to be put together at the dwelling site.

## III

## DEFENDANTS

5. The defendant, United States Steel Corporation, is organized and exists under the laws of the State of Delaware and has its principal place of business in Pittsburgh, Pennsylvania. Within the period of time covered by this Complaint the defendant, United States Steel Corporation, through its division United States Steel Homes Division, has engaged in the business of manufacturing, purchasing and selling on a nationwide basis prefabricated houses and component parts for dwelling houses constructed basically of steel and called United States Steel homes.

6. The defendant, United States Steel Homes Credit Corporation, is organized and exists under the laws of the State of Delaware and has its principal place of business in New York, New York. It is a wholly owned subsidiary of United States Steel Corporation. Within the period of time covered by this Complaint United States Steel Homes Credit Corporation has engaged in the business of financing real estate upon which prefabricated houses are constructed.

7. The Acts alleged in this Complaint to have been done by each of the corporate defendants were authorized, ordered or done by the officers, agents employees or representatives of such defendant while actively engaged in the management, direction and control of its affairs.

## IV

## NATURE OF TRADE AND COMMERCE

8. Within the period of time covered by this Complaint the defendant United States Steel Corporation through its division United States Steel Homes Division manufactured and purchased and sold component parts for United States Steel Homes at its factories and places of business throughout the United States, including its factory at New Albany, Indiana. Said United States Steel homes and the component parts thereof were shipped in interstate commerce from various factories and places of business of United States Steel Corporation to the plaintiff and others in Louisville, Jefferson County, Kentucky.

9. Substantial quantities and numbers of United States Steel Homes and their component parts have been shipped or transported into and sold in Louisville, Jefferson County, Kentucky from other states within the period of time covered by this Complaint.

10. Within the period of time covered by this Complaint, United States Steel Homes and component parts for prefabricated homes accounted for a substantial quantity of the prefabricated steel homes and their component parts shipped in interstate commerce into and sold in Louisville, Jefferson County, Kentucky.

11. Within the period of time covered by this Complaint the defendant, United States Steel Homes Credit Corporation, transacted business in various states throughout the United States including Louisville, Jefferson County, Kentucky where it loaned sums of money and entered into contracts and loan agreements affecting the United States Steel Homes shipped and sold in interstate commerce as described in paragraphs 8 through 10 of this Complaint.



## V

## OFFENSES CHARGED

12. Beginning at least as early as October, 1960 and continuing to the present time, the defendants have engaged in a contract, combination and conspiracy in unreasonable restraint of and to monopolize the aforesaid interstate trade and commerce in prefabricated houses and their component parts in violation of Sections 1 and 2 of the Sherman Act.

13. The aforesaid contract, combination and conspiracy consisted of a continuing agreement and concert of action between the defendants to force corporations and individuals, including the plaintiff, as a condition to availing themselves of the services of United States Steel Homes Credit Corporation, to purchase at artifically high prices only United States Steel Homes which are manufactured by United States Steel Homes Division, United States Corporation.

14. On the 28th day of October, 1960, this plaintiff, in order to avail itself of the services of United States Steel Homes Credit Corporation, entered into a contract with the United States Steel Homes Credit Corporation by the terms of which said defendant agreed to loan this plaintiff certain sums of money, one of the conditions of that agreement being that plaintiff was required ". . . to complete development of the premises and to erect on each of said lots free from all mechanic's liens a prefabricated dwelling house manufactured by the United States Steel Homes Division, United States Steel Corporation." (A copy of said loan agreement is attached hereto and made a part hereof as if fully copied herein and is marked Exhibit A.)

15. After the aforementioned loan agreement was executed and this plaintiff had begun said housing develop-

ment in Louisville, Jefferson County, Kentucky, the defendant, United States Steel Homes Division, United States Steel Corporation, commenced furnishing this plaintiff with faulty, defective and unusable material for the construction of said houses. It was anticipated by the terms of the aforementioned loan agreement that this plaintiff would construct approximately one-hundred eighty-seven (187) houses in the total development, and after the construction of seventy (70) houses, because of the faulty and defective material furnished by the defendant, United States Steel Homes Division, United States Steel Corporation, this plaintiff has been unable to complete said project.

16. In order to effectuate the aforementioned contract, combination and conspiracy the defendant, United States Steel Homes Credit Corporation, has threatened and is continuing to threaten to foreclose the mortgage held by it under the terms of the aforementioned loan agreement, even though plaintiff's inability to continue performance has been directly caused by the illegal acts of the defendants. (A description of said mortgage property is contained in the copy of the mortgages attached hereto and is marked Exhibit B.) The threat to foreclose on the aforementioned mortgage is an imminent one as is evidenced by the attached letter addressed to the plaintiff from United States Steel Homes Credit Corporation (a copy of said letter is attached hereto as Exhibit C), and such foreclosure will do irreparable injury, harm and damage to the plaintiff should it be carried out pending the adjudication of this lawsuit.

17. As a direct and proximate result of the aforementioned contract, combination and conspiracy the defendants have caused the plaintiff:

A. To purchase United States Steel Homes at unreasonably high prices.



B. To expend additional sums on each house built to date to repair or replace the damage caused by the faulty, defective and unusable material furnished by United States Steel Homes Division, United States Steel Corporation.

C. To be delayed in the completion of the homes planned to be built in the aforesaid development to the extent that plaintiff is now unable to go forward with the development.

D. To have lost profits on homes already built and to lose profits on the homes contemplated by the parties to be built which plaintiff has been unable to build, both in the amount of approximately $900.00 per each of the 187 houses, or a total of $168,300.00.

E. To have its reputation as a developer and builder irreparably damaged due to the inferior homes built as a result of the defective materials furnished plaintiff.

F. To be unable to purchase prefabricated steel homes or their component parts from other manufacturers.

WHEREFORE, plaintiff, Fortner Enterprises, Inc., demands:

1. Judgment against the defendants, United States Steel Corporation and United States Steel Homes Credit Corporation for treble the sum of $168,300.00, being the amount of damages plaintiff has incurred as a result of the defendants' illegal acts, a reasonable fee for the services of its attorneys in prosecuting this action, and its costs herein expended.

2. For a decree against the defendants permanently enjoining and prohibiting their enforcement of the provision or provisions of the aforementioned loan agreement which require plaintiff to construct the prefabricated

houses in this development exclusively out of products furnished by United States Steel Homes Division, United States Steel Corporation.

3. That the plaintiff be awarded all other just and proper relief to which it may appear entitled.

Kenneth L. Anderson
A Scott Hamilton, Jr.
Attorneys for Plaintiff.

EXHIBIT "A"

——CONFORMED COPY——

LOAN AGREEMENT

THIS AGREEMENT, made this 28th day of October, 1960, by and between FORTNER ENTERPRISES, INC., a corporation organized and existing under and by virtue of the laws of the State of Kentucky, (hereinafter called the "Borrower") and U. S. STEEL HOMES CREDIT CORPORATION, a corporation organized and existing under and by virtue of the laws of the State of Delaware, having an office in New Albany, Indiana, (hereinafter called the "Lender");

WITNESSETH:

WHEREAS, Borrower has acquired, or will acquire, a certain tract of land comprising approximately One Hundred Fifty-seven (157) undeveloped building lots and Thirty (30) fully developed building lots, all located in Golden Meadows Subdivision, Jefferson County, Kentucky, (hereinafter referred to as the "Premises"); and

WHEREAS, the Premises have been subdivided or will be subdivided into approximately One Hundred Eighty-seven (187) lots, which Borrower intends to develop by the



installation on One Hundred Fifty-seven (157) of said lots of necessary land improvements, and to construct on each of said One Hundred Eighty-seven (187) of said lots single-family dwellings utilizing products of United States Steel Homes Division, United States Steel Corporation (said lots being hereinafter referred to as the "Lots"); and

WHEREAS, Borrower has applied for a loan to assist in financing the acquisition and development of said Premises and the construction of dwellings thereon;

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained and of other valuable considerations, the parties hereto agree as follows:

PART A.

1. The Borrower agrees to take and the Lender agrees to make (subject to this Agreement) a loan in the principal sum of TWO MILLION FIFTY-FIVE THOUSAND THREE HUNDRED DOLLARS ($2,055,300.00) (hereinafter called the "Loan") to be advanced as hereinafter provided, said Loan being evidenced by:

a. A promissory note duly executed by the Borrower in the principal amount of EIGHTY-EIGHT THOUSAND DOLLARS ($88,000.00), maturing December 31, 1961, and bearing interest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable monthly on the first day of each month (said note being hereinafter referred to as Land Note No. 1);

b. A promissory note duly executed by the Borrower in the principal amount of TWO HUNDRED THIRTY-ONE THOUSAND NINE HUNDRED TWENTY DOLLARS ($231,920.00), maturing December 31, 1962, and bearing interest at the rate of six per centum (6%) per annum computed from the date of each advance,

said interest being payable monthly on the first day of each month (said note being hereinafter referred to as Land Note No. 2);

c. A promissory note duly executed by the Borrower in the principal amount of THREE HUNDRED SEVENTY-THREE THOUSAND TWO HUNDRED DOLLARS ($373,200.00), payable to the Lender or order, maturing December 31, 1961, and bearing interest at the rate of six per centum (6%) per annum computed from the date of each advance (said note being hereinafter referred to as Construction Note No. 1);

d. A promissory note duly executed by the Borrower in the principal amount of ONE MILLION THREE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED EIGHTY DOLLARS ($1,362,180.00), payable to the Lender or order, maturing December 31, 1962, and bearing interest at the rate of six per centum (6%) per annum computed from the date of each advance (said note being hereinafter referred to as Construction Note No. 2);

e. A Mortgage Deed conveying the above described Premises as security for all of the above notes, which Mortgage Deed shall at all times constitute a valid and the only lien on the aforesaid Premises, except for taxes and assessments not overdue.

2. The Borrower agrees to do and perform the following acts and things:

a. To furnish Lender with executed copies of all contracts by and between Borrower and others for the site development of the Premises (hereinafter referred to as the "Development Contracts"), together with a detailed estimate by a registered professional engineer (hereinafter referred to as "Consulting Engineer") of



the quantities, units and unit prices of the work to be performed under the Development Contracts;

b. To complete the development of the Premises and to erect on each of said Lots, free from all mechanics' liens, a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation, (hereinafter called the "dwelling house") and to construct and install said improvements and to construct said dwelling houses strictly in accordance with the Development Contracts and working drawings prepared therefor and in accordance with all applicable ordinances and statutes, use restrictions of record and in accordance with the requirements of all regulatory authorities and in conformity with the requirements of the Federal Housing Administration (hereinafter referred to as "FHA");

c. To furnish Lender with satisfactory evidence that Workmen's Compensation Insurance coverage of Borrower and/or its subcontractors required by applicable law has been provided, together with certificates evidencing public liability and property damages insurance in the amounts of $100,000.00 each person and $300,000.00 each accident for injuries to persons, and $50,000.00 each accident for damage to property;

d. To furnish fire and extended coverage insurance on each of the dwelling houses, in amount, form and in companies satisfactory to Lender, which insurance shall be payable to the Borrower, with standard mortgagee endorsement attached making loss payable to the Lender or its assigns as mortgagee;

e. To pay all taxes and assessments which are delinquent or in collection;

f. To allow Lender and its agents, until such time as the Loan is paid in full, the right of entry and free

access to the Premises, the right to inspect all work done, labor performed and materials furnished, and to inspect all books, contracts and records of Borrower insofar as the same relate to the Premises;

g. To furnish Lender, upon request, a current statement of financial condition with such supporting detail as may be required by Lender;

h. To indemnify and hold and save harmless Lender from any and all loss, cost, damage, liability and expense, which it may suffer or incur, by reason of the perfecting of statutory liens, against any or all of the premises described in the said mortgage, on account of work or labor performed or on account of the furnishing of machinery, material and fuel;

i. To pay to the Lender on or before sixty (60) days from the date hereof, an Inspection Fee of One Hundred Dollars ($100.00);

j. To pay to the Lender as hereinafter provided, a Service Fee of one-half of one per centum (½ of 1%) of the total principal amount of the promissory notes hereinabove referred to.

3. The Lender may require the Borrower to obtain and attach to each application for an advance on account of the Loan, acknowledgments of payment and releases of liens down to the time of the making of such advance, from all contractors and subcontractors and materialmen covering all work, labor, machinery, materials and fuel, done, performed or furnished with respect to the development and in connection with the construction of any of the said dwelling houses.

4. Upon the occurrence of any of the following events:

a. The Borrower shall at any time prior to the completion of the said improvements and the said dwelling



houses abandon the installation and/or construction thereof or shall cease work thereon for a period of more than seven (7) days, stoppage by reason of strikes, labor disputes, shortages of materials and acts of God and other matters beyond its control excepted;

b. An order in aid of execution or attachment shall be served upon the Lender by any creditor of the Borrower and not released within five (5) days from the date thereof;

c. The Borrower shall fail to commence installation of said land improvements or the construction of said dwelling houses within thirty (30) days after the date of the Notes and Mortgage, or within such additional number of days as the Lender may grant in writing;

d. An event of default as defined in the said Mortgage shall occur and subsist for the period of time, if any, therein specified in respect thereof, and the Lender shall take any action to enforce its right under the said Mortgage or the Notes secured thereby; or

e. The Borrower shall otherwise fail to comply with the terms of this Agreement or with the terms and provisions of the Notes or the Mortgage;

then and in any such event, at the option of the Lender all obligation on its part to make further advances on account of the Loan shall cease, and the Lender may enter into possession of the premises and perform any and all work and labor necessary to complete said improvements and erect said dwelling houses substantially according to the Development Contract and the working drawings therefor and the applicable plans and description of materials and employ watchmen to protect the premises.

5. The Lender does not assume and is hereby expressly released and discharged from any and all liability and

responsibility whatsoever, which might or could arise out of the disbursement of the Loan or as to the method, manner or application of such disbursement, or as to mechanics' or materialmen's liens or any other liens whatsoever which might attach to or be filed against the aforesaid premises.

6. Within ten (10) days from the date of the Mortgage, and in any event prior to the Lender's disbursing any portion of the Loan to the Borrower, the Borrower at its own cost and expense, will cause to be issued and delivered by a qualified title insurance company (hereinafter called the "Title Company") to the Lender a mortgagee's policy of title insurance in standard ATA form incorporating those provisions set forth in Exhibit "A" attached hereto and made a part hereof. At the option of the Lender, all disbursements of the said Loan may be made through and under the supervision of Title Company and the Borrower agrees to do all acts and things necessary to comply with all conditions contained in the said policy, so that the Lender shall be entitled to the full benefit of the said policy with respect to all amounts disbursed on account of the said Loan.

PART B.

1. The proceeds of Land Note No. 1 and Land Note No. 2 shall be disbursed only after receipt by the Lender of the following:

a. Evidence that the Premises are served by all necessary utilities, are zoned for single-family dwellings, and that products of United States Steel Homes Division, United States Steel Corporation comply with applicable codes and ordinances;

b. Copy of the proposed record plat of the subdivision of the Premises, together with evidence that the subdivision as platted has been approved by FHA;



c. A detailed estimate prepared by the Consulting Engineer setting forth the estimated total cost of development of the Premises;

d. A copy of a mortgage take-out commitment by an investor and on terms acceptable to Lender in an amount sufficient to cover all mortgages originated on the dwelling houses to be erected on the Lots with the proceeds of the Construction Notes;

e. The mortgagee's policy of title insurance referred to in Item 6. of PART A. above;

f. Certified copy of a current financial statement of Borrower, satisfactory to Lender.

2. The proceeds of Land Note No. 1 shall be disbursed as follows:

a. The first advance shall be in the amount of SIXTY-THREE THOUSAND THREE HUNDRED TWENTY-FIVE DOLLARS ($63,325.00), plus the sum of TEN THOUSAND TWO HUNDRED SEVENTY-FIVE DOLLARS ($10,275.00), which latter sum representing the Service Fee of one-half of one per centum (½ of 1%) due by Borrower to Lender under the provisions of Item 2. j. of PART A. above shall be paid by Lender to itself for the account of Borrower in payment of said Service Fee, and shall be made at the time of loan closing.

b. The remaining proceeds of Land Note No. 1, in the amount of FOURTEEN THOUSAND FOUR HUNDRED DOLLARS ($14,400.00), shall be disbursed from time to time as hereinafter provided on the basis of certificates furnished Lender by the Consulting Engineer as to the dollar amount of the contract value of work in place on the sixteen (16) lots comprising Section 1-F of the Premises properly completed

as of the date of such certification; provided, however, that prior to Lender disbursing or obligating itself in any manner to disburse said remaining proceeds of Land Note No. 1, or any of the other promissory notes referred to hereinabove, Borrower shall furnish Lender with the following:

(1) A certified copy of the recorded plats of subdivision of Sections 1-A, 1-B, 1-F, 1-G, and 4-A of the Premises;

(2) Copies of all contracts entered into by Borrower for the development of Section 1-F of the Premises;

(3 Signed copies of the performance bond or bonds, if any, entered into by Borrower with the appropriate public and municipal authorities for the completion of such improvements of said Section 1-F of the Premises as to which said authorities may require such bond or bonds;

(4) Copies of Commitments to Insure issued by FHA applicable to not less than forty (40) lots in Sections 1-A, 1-B, 1-F, 1-C, and 4-A of the Premises.

c. Any further sums of money in excess of the amounts disbursed under the provisions of paragraph 2. b., above, which shall be required to complete payment in full of the dollar amounts of the work in place necessary to the full completion of the development of Section 1-F of the Premises as set forth in the Development Contracts above referred to, shall be paid by the Borrower to said Title Company for disbursement through and under the supervision of said Title Company as certifications requiring such disbursement are submitted by said Consulting Engineer.

3. The proceeds of Land Note No. 2 shall be disbursed as follows:



a. The first advance shall be in the amount of ONE HUNDRED SEVEN THOUSAND ONE HUNDRED SEVENTY-FIVE DOLLARS ($107,175.00), and shall be made at time of loan closing;

b. The remaining proceeds, in the amount of ONE HUNDRED TWENTY-FOUR THOUSAND SEVEN HUNDRED FORTY-FIVE DOLLARS ($124,745.00), shall be disbursed from time to time, as hereinafter provided, on the basis of certifications furnished Lender by the Consulting Engineer as to the dollar amount of the contract value of work in place on any and all lots in the Premises excepting those lots situated in Sections 1-A, 1-B, 1-F, 1-C, and 4-A properly completed as of the date of such certification, provided, however, that prior to Lender disbursing or obligating itself in any manner to disburse any remaining portion of Land Note No. 2 or any portion of Construction Note No. 2, Borrower shall furnish Lender with the following:

(1) A certified copy of the recorded plat of subdivision of the entire Premises;

(2) Copies of all contracts entered into by Borrower for the development of the Premises;

(3) Signed copies of the performance bond, or bonds, if any, entered into by Borrower with the appropriate public and municipal authorities for the completion of those of the improvements to the Premises for which said authorities may require such bond or bonds;

all provided, however, that disbursement of the remaining proceeds of Land Note No. 2, as provided above, shall be made only after Lender is in receipt of satisfactory evidence that Borrower has procured bona fide contracts for the purchase of houses to be constructed on not less than

twenty-three (23) lots situated in Sections 1-A, 1-B, 1-F, 1-C, and 4-A of the Premises, has received a deposit of not less than Ninety-nine Dollars ($99.00) on each such contract, and has procured credit approval of the prospective purchaser under each such contract from the issuer of the mortgage take-out commitment referred to hereinabove;

c. Any further sums of money in excess of the amounts disbursed under the provisions of paragraph 3. b., above, which shall be required to complete payment in full of the dollar amounts of the work in place necessary to the full completion of the development of the Premises as set forth in the Development Contracts above referred to, shall be paid by the Borrower to said Title Company for disbursement through and under the supervision of said Title Company as certifications requiring such disbursement are submitted by said Consulting Engineer.

PART C.

1. For the purpose of allocating the proceeds of Construction Note No. 1 and Construction Note No. 2 to be advanced to the Borrower hereunder, the maximum amount of such proceeds to be allocated to each of the proposed Lots covered by this Agreement shall be, as to each said sublot, whichever amount is the lesser of either that amount set forth in Column (3) on Exhibit "B" attached hereto, or that amount arrived at by subtracting the pro-rata share of the proceeds of the Land Notes allocated each of said sublots as set forth in Column (2) of said Exhibit "B", from eighty-five per centum (85%) of the valuation of the particular house and lot established by the FHA as the basis for the Commitment to Insure issued therefor; provided, however, that Lender shall not be obligated to make any disbursement of the proceeds of Construction Note



No. 1 in connection with any dwelling unless the dwelling house package therefor shall have been shipped from United States Steel Homes Division on or before October 1, 1961, and shall not be obligated to make any disbursement of the proceeds of Construction Note No. 2 in connection with any dwelling unless the dwelling house package therefor shall have been shipped from United States Steel Homes Division on or before October 1, 1932.

2. Prior to Lender's obligating itself to make payment of any house shipped for account of Borrower and prior to Lender's making the first or any subsequent advance of the amount of the proceeds of the Loan allocated to a given house and Lot, Lender shall be in receipt of:

a. A copy of the FHA Conditional Commitment to Insure applicable thereto; and

b. Satisfactory evidence that the house and Lot in respect of which advance of loan proceeds is requested has been sold, that the purchaser thereof has made a cash deposit of not less than Ninety-nine Dollars ($99.00), and that a permanent investor has approved the purchaser as mortgagor in the amount of the mortgage to be originated and agrees to purchase said mortgage after it is duly endorsed for insurance by the FHA.

3. The proceeds of the Construction Notes as allocated to each of the proposed Lots shall be disbursed as follows:

a. The first advance shall be made when the concrete slab of a given house is installed and the Lender is in receipt of (a) a sworn statement by a Registered Engineer showing that the slab in question is located wholly within the lot lines in accordance with the restrictions of record and zoning ordinances and (b) a copy of the FHA First Compliance Inspection Report

showing no exceptions. The amount of the first advance shall be One Thousand Dollars ($1,000.00);

b. The second advance shall be made when as to a given house Lender is in receipt of a copy of the FHA Second Compliance Inspection Report showing no exceptions. The second advance shall be One Thousand Dollars ($1,000.00) plus a sum equal to the purchase price of the dwelling house package, including sales tax and freight, as shown by the applicable Treasury Invoice of the United States Steel Homes Division of United States Steel Corporation. From the amount of each such second advance Lender shall pay on behalf of Borrower the amount shown to be due by said Treasury Invoice, to United States Steel Homes Division of United States Steel Corporation, for the account of the Borrower;

c. The third advance shall be made when as to a given house the finished floor is laid, interior trim installed, kitchen units installed, furnace and hot water heater installed, bath fixtures installed, and interior painting is completed. The third advance shall be an amount equal to ninety per centum (90%) of the maximum amount of the Construction Note so allocated less the amounts of the first two advances described above;

d. The final advance shall be one hundred per centum (100%) of said proceeds less the aggregate total of the three previous advances and shall be made when as to a given house all construction is completed and the Lender is in receipt of the final FHA Compliance Inspection Report without exceptions save for those items for which suitable escrows have been established with the FHA.

PART D.

1. An individual written release of lien of mortgage from the U. S. Steel Homes Credit Corporation for each of



the lots duly and regularly platted within the premises described in said mortgage shall be prepared in proper form and deposited with Title Company within sixty (60) days from the date of said mortgage. Upon proof that the shell of a prefabricated single-family dwelling house manufactured by the United States Steel Homes Division of United States Steel Corporation has been erected by Borrower upon any given lot, the applicable release of lien of mortgage shall be placed on record in the Records of Mortgages for Jefferson County, Kentucky, upon payment by Borrower to Title Company for the account of Lender:

a. The sum of Two Thousand Two Hundred Dollars ($2,200.00), to be applied first to reduction of principal of Land Note No. 1 until said note is paid in full, and thereafter to reduction of principal of Land Note No. 2;

b. An amount aggregating that portion of the proceeds of Construction Note No. 1 or Construction Note No. 2, and interest accrued thereon, which has been advanced to finance construction of a dwelling on said lot, for application to reduction of principal of Construction Note No. 1 or Construction Note No. 2, whichever is applicable.

2. This agreement, together with the notes and mortgage hereinabove described, constitute the entire agreement between the Borrower and the Lender and no representations or agreements, express or implied, have been made to or with the Borrower not herein contained. This Agreement shall not be amended or modified, nor may any of its terms or conditions be waived, except by an instrument in writing executed in the name of and on behalf of the Lender by one of its officers thereunto duly authorized.

3. Any notice or demand upon the Borrower shall be deemed to have been sufficiently given or served for all

purposes hereof if mailed to Borrower by registered or certified mail addressed to 4123 South Third Street, Louisville, Kentucky, or such other address as the Borrower may furnish to the Lender for such purpose. Any notice or demand upon the Lender shall be deemed to have sufficiently been given or served for all purposes hereof if delivered personally to its Vice President or mailed to it for the attention of its Vice President by registered mail addressed to it at Mutual Trust and Deposit Building, 322 Pearl Street, New Albany, Indiana, or at such other address as the Lender may furnish the Borrower for such purpose.

4. No right, interest or benefit of the Borrower hereunder may be assigned or otherwise transferred unless the written consent of the Lender shall first be obtained. Nothing in this Agreement, express or implied, shall confer upon any person, firm or corporation, other than the Lender, together with its successors or assigns, and the Borrower, together with its successors or assigns, subject to the limitation contained in the next preceding sentence, any right, remedy, or claim, legal or equitable, hereunder or by reason hereof; this Agreement and all of its covenants and conditions being intended to be and being for the sole and exclusive benefit of such persons specified as aforesaid.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first above written.

FORTNER ENTERPRISES, INC.
By /s/ A. B. Fortner, Jr.
President
/s/ Edna Herberman
Secretary



U. S. STEEL HOMES CREDIT CORPORATION
By /s/ R. C. Dyas
Vice President
/s/ W. L. Rollins
Assistant Secretary

## AMENDED EXHIBIT "A"

(Attached to and made a part of Loan Agreement dated October 28, 1960, between Fortner Enterprises, Inc. and U. S. Steel Homes Credit Corporation)

### TITLE POLICY PROVISIONS

The Mortgage Deed executed contemporaneously herewith shall be insured to the amount of the Loan as a first and valid lien against the property therein described except for the following:

1. Taxes and assessments not yet due and payable.

2. Such state of facts as would be disclosed by an accurate survey and inspection of the premises.

NOTE: Subject to other provisions of the Policy, the maximum liability of the insurer may be limited to not less than the following respective amounts for the several lots designated on any duly recorded plat of the premises, namely:

Each Lot—$13,600.00

NOTE: The liability of the insurer under the policy shall be limited to actual amounts disbursed on the mortgage loan which the above referred to Mortgage Deed secures, but will increase as each disbursement is made up to the face amount of the policy.

## AMENDED EXHIBIT "B"

(Attached to and made a part of Loan Agreement dated October 28, 1960, between Fortner Enterprises, Inc. and U. S. Steel Homes Credit Corporation)

| Lot No. | Estimated FHA Valuation | (1) Maximum Total Loan (85% of Valuation) | (2) Amount of Loan Allocated to Land Notes | (3) Amount of Loan Allocated to Construction Notes |
|---|---|---|---|---|
| Each Lot | $16,000.00 | $13,600.00 | $ 1,720.00 | $11,880.00 |

## EXHIBIT "B"

RECORDED OCTOBER 28, 1960
JEFFERSON COUNTY, KENTUCKY
MGT. RECORD 395, PAGE 314

——CONFORMED COPY——

### MORTGAGE DEED

THIS MORTGAGE, between Fortner Enterprises, Inc. a Kentucky corporation having a principal place of business in the City of Louisville, County of Jefferson, State of Kentucky, GRANTOR, and U. S. Steel Homes Credit Corporation, a Delaware corporation having a place of business in the City of New Albany, County of Floyd, and State of Indiana, GRANTEE:

WITNESSETH: Whereas GRANTOR desires to secure certain obligations to GRANTEE by mortgaging certain real estate;

NOW, THEREFORE, GRANTOR, for the purposes herein described, intending to be legally bound hereby, and in consideration of TEN and NO/100 DOLLARS ($10.00)



received to its full satisfaction from GRANTEE, does hereby grant, bargain, sell, and convey to GRANTEE, its successors and assigns, the following described real estate, to-wit:

Situated in the County of Jefferson, State of Kentucky, and being more particularly described as follows, to wit:

PARCEL 1

Lot Nos. 29 and 72 as shown and designated on the plat of Golden Meadows Section 1-A as it is recorded in Plat and Subdivision Book 15, Page 1, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 2

Lot Nos. 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 48, 49, 50, 51, 52, 53, 54, and 55 as shown and designated on the plat of Golden Meadows Section 1-B as it is recorded in Plat and Subdivision Book 15, Page 33, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 3

Lot Nos. 98, 99, 100, 101, 102, 103, and 104 as shown and designated on the plat of Golden Meadows Section 1-C as it is recorded in Plat and Subdivision Book 15, Page 42, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 4

Lot Nos. 418, 419, and 710 as shown and designated on the plat of Golden Meadows Section 4-A as it is recorded in Plat and Subdivision Book 14, Page 81, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 5

Beginning at a point in the South line of Constance Drive as shown on the plat of Golden Meadows Section

1-B, which plat is of record in Plat and Subdivision Book 15, Page 33 in the Jefferson County Court Clerk's Office, at a corner common to Golden Meadows Section 1-A as shown on the plat of same of record in Plat and Subdivision Book 15, Page 1 in said Clerk's Office, thence with the South line of said Constance Drive North 81°15′ East 272.23 feet, thence South 8°45′ East 130.0 feet, thence North 81°15′ East 75.0 feet to a point in the center of a ditch, thence with said ditch South 8°45′ East 234.97 feet and South 5°22′ East 455.77 feet to the Northeasterly corner of the tract conveyed to the Rt. Rev. John Floresch recorded in Deed Book 3349, Page 439; thence with the North line of said tract North 65°58′ West 681.51 feet to the Southeasterly corner of Golden Meadows, Section 1-A hereinabove mentioned, thence with the Easterly line of said Golden Meadows, Section 1-A North 20°31′ East 516.90 feet to the place of beginning;

PARCEL 6

Beginning at a point in the Southerly line of the tract conveyed to Rt. Rev. John Floersch by deed of record in Deed Book 3349, Page 439, in the Jefferson County Court Clerk's Office, said point being the Northeasterly corner of Golden Meadows, Section 4-A as shown on the plat of same, which plat is of record in Plat and Subdivision Book 14, Page 81 in the aforementioned Clerk's Office, thence with the Southerly line of the tract conveyed to the Rt. Rev. John Floersch aforementioned, South 65°58′ East 756.25 feet and South 65°00′ East 140.97 feet, South 3°40′ West 386.18 feet to a corner of and in the line of the remaining lands of E. M. Houchin, thence with several lines of said Houchins North 65°00′ West 691.08 feet, South 20°31′ West 758.26 feet and North 63°25′ West 321.80 feet to the Southeasterly corner of Golden Meadows, Section



4-A hereinabove mentioned, thence with several lines of said Golden Meadows, Section 4-A as follows, North 20°31′ East 384.74 feet, North 69°01′ West 140.0 feet, North 20°31′ East 60.0 feet, South 69°01′ East 140.0 feet and North 20°31′ East 652.94 feet to the place of beginning;

PARCEL 7

Beginning at an iron pipe at the corner common to Golden Meadows, Section 1-B, the plat of which is recorded in Plat and Subdivision Book 15, Page 33 in the Jefferson County Clerk's Office, and Golden Meadows, Section 1-C as shown by the Revised plat of same of record in Plat and Subdivision Book 15, Page 42 in said Clerk's Office, thence with seveal lines of said Golden Meadows, Section 1-C as follows, South 8°38′ East 673.92 feet, South 4°32′ West 175.69 feet, South 25°02′ West 850.90 feet, North 60°00′ West 283.48 feet, North 84°30′ West 105.83 feet, North 34°18′ West 97.53 feet and North 86°21′ West 130.0 feet to a point in the center of a drainage ditch; thence with the center of said drainage ditch North 3°40′ East 45.47 feet, North 5°22′ West 974.10 feet and North 8°45′ West 234.97 feet to a point in the Southerly line of Golden Meadows, Section 1-B as hereinabove mentioned, thence with several lines of said Golden Meadows, Section 1-B as follows, North 81°15′ East 444.68 feet, North 8°38′ West 130.0 feet, North 81°15′ East 60.0 feet, South 8°38′ East 100.00 feet, North 81°22′ East 135.07 feet, South 8°45′ East 29.77 feet and North 81°15′ East 314.72 feet to the place of beginning.

TO HAVE AND TO HOLD the said premises, with all appurtenances, to GRANTEE, its successors and assigns, with covenants of General Warranty, to secure:

FIRST: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of EIGHTY-EIGHT THOUSAND DOLLARS ($88,000.00), with in-

terest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable on the first day of each month beginning January 1, 1961, it being expressly agreed in said note that said principal sum and interest then unpaid shall be due and payable on or before December 31, 1961, it being expressly agreed therein that the whole of said principal sum and interest then unpaid may be declared and become due and payable in the event of default as therein defined;

SECOND: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of TWO HUNDRED THIRTY-ONE THOUSAND NINE HUNDRED TWENTY DOLLARS ($231,920.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable on the first day of each month beginning January 1, 1961, it being expressly agreed in said note that said principal sum and interest then unpaid shall be due and payable on or before December 31, 1962, it being expressly agreed therein that the whole of said principal sum and interest then unpaid may be declared and become due and payable in the event of default as therein defined;

THIRD: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of THREE HUNDRED SEVENTY-THREE THOUSAND TWO HUNDRED DOLLARS ($373,200.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, it being expressly agreed in said note that said principal sum together with said interest shall be due and payable on or before December 31, 1961, it being expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

FOURTH: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of ONE



MILLION THREE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED EIGHTY DOLLARS ($1,362,180.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, it being expressly agreed in said note that said principal sum together with said interest shall be due and payable on or before December 31, 1962, it being expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

FIFTH: Payment by GRANTOR to GRANTEE of all sums expended or advanced by GRANTEE pursuant to this Mortgage or the Loan Agreement entered into between the parties of even date herewith;

SIXTH: Performance of each undertaking of GRANTOR contained herein, and performance of each undertaking of GRANTOR contained in said Loan Agreement;

SEVENTH: Payment by GRANTOR to GRANTEE of all other indebtedness, direct or contingent, now or hereafter owing by GRANTOR to GRANTEE.

FOR THE CONSIDERATION AFORESAID, GRANTOR covenants and agrees that:

FIRST: GRANTOR is lawfully seized in fee simple of said premises and has good right to sell and convey the same as aforesaid; said premises are free of all encumbrances, except liens for taxes and assessments not yet due and payable and any building and use restrictions of record; and GRANTOR will warrant and defend the title to the premises forever against the claims and demands of all persons whomsoever.

SECOND: GRANTOR shall keep all buildings and other insurable property now or hereafter erected or placed in or on said mortgaged property insured against fire and other hazards, as undertaken in the aforementioned Loan Agreement.

THIRD: GRANTOR will maintain the mortgaged property free from any waste or nuisance, and will do all things necessary to maintain said property in good condition, and will pay when due all claims for labor performed and material furnished, and will not permit any lien of mechanics or materialmen to attach to the mortgaged property.

FOURTH: GRANTOR will pay, before they become delinquent, all taxes and assessments lawfully imposed upon the mortgaged property, and will promptly at the request of GRANTEE deliver to GRANTEE the receipt for such payment.

FIFTH: If GRANTOR fails to pay any taxes, assessments, liens, or insurance premiums when the same are due and payable, or otherwise defaults in the performance of any other covenant hereunder or under the said Loan Agreement, the security hereby created shall then become enforceable. GRANTEE may thereupon pay any such sums and perform any such covenants in respect of which there has been a default, and GRANTOR agrees promptly to repay any sums so advanced, without demand, with interest at the rate of six per centum (6%) per annum from the date of such advances, and such sums so advanced, with such interest, shall be secured hereby, but no such advance shall relieve GRANTOR of the consequences of any such default.

SIXTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may declare all sums secured hereby immediately due and payable, and GRANTOR shall then pay said sums forthwith.

SEVENTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may take possession of the mortgaged property, manage it and collect rents therefrom and apply same, less reasonable



collection costs, upon the indebtedness hereby secured, and all leases and rents of the mortgaged property, after the security shall become enforceable, are hereby assigned and mortgaged to GRANTEE as additional security for the indebtedness secured hereby.

EIGHTH: GRANTOR will not claim the benefit of any stay, extension, appraisement, or redemption law now or at any time hereafter in effect.

PROVIDED, ALWAYS, that if GRANTOR pays to GRANTEE the principal and interest on said notes, when and as the same shall become due and payable, and pays any and all other sums payable under said notes or under this Mortgage or secured by this Mortgage, this conveyance shall thereupon become null and void, and in such case GRANTEE shall execute and deliver to GRANTOR, at GRANTOR's cost, an appropriate release and discharge of this Mortgage in form to be recorded.

IN WITNESS WHEREOF, GRANTOR in pursuance of a resolution adopted by its Board of Directors on the 26th day of October, 1960, has hereunto caused its corporate name to be affixed and these presents to be subscribed by its President and Secretary this 28th day of October, 1960.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner, Jr.
President

And /s/ Edna Herberman
Secretary

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS.

I, a Notary Public in and for the County and State aforesaid do certify that on this day the foregoing Mortgage from Fortner Enterprises, Inc., to U. S. Steel Homes Credit Corporation was produced before me and acknowl-

edged and delivered before me by A. B. Fortner, Jr. as President of Fortner Enterprises, Inc., a corporation, party thereto, to be the act and deed of said corporation by him as its President, thereunto duly authorized, and the seal of said corporation as affixed to said deed was attested and proven before me by Edna Herberman, as its Secretary.

Given under my hand and seal of office this 28th day of October, 1960.

/s/ Samuel Steinfeld
Notary Public, Jefferson County, Kentucky.

My commission expires on the 6th day of August, 1964.

EXHIBIT "D-1"

——CONFORMED COPY——

LAND NOTE NO. 1
MORTGAGE NOTE

$88,000.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1961, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of EIGHTY-EIGHT THOUSAND DOLLARS ($88,000.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum, said interest being payable monthly on the first day of each month commencing January 1, 1961.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain



Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner, Jr.
President

ATTEST:
/s/ Edna Herberman
Secretary

EXHIBIT "D-2"

——CONFORMED COPY——

LAND NOTE NO. 2
MORTGAGE NOTE

$231,920.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of TWO HUNDRED THIRTY-ONE THOUSAND NINE HUNDRED TWENTY DOLLARS ($231,920.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum, said interest being payable monthly on the first day of each month commencing January 1, 1961.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such



advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.
By /s/ A. B. Fortner, Jr.
President

ATTEST:
/s/ Edna Herberman
Secretary

EXHIBIT "D-3"

——CONFORMED COPY——

CONSTRUCTION NOTE NO. 1
MORTGAGE NOTE

$373,200.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1961, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corpora-

tion, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of THREE HUNDRED SEVENTY-THREE THOUSAND TWO HUNDRED DOLLARS ($373,200.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County



of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.
By /s/ A. B. Fortner, Jr.
President

ATTEST:
/s/ Edna Herberman
Secretary

EXHIBIT "D-4"

—CONFORMED COPY—

CONSTRUCTION NOTE NO. 2
MORTGAGE NOTE

$1,362,180.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of ONE MILLION THREE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED EIGHTY DOLLARS ($1,362,180.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and

become due and pabable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms of provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner, Jr.
President

ATTEST:
/s/ Edna Herberman
Secretary



EXHIBIT "Y"

REGISTERED MAIL—RETURN
RECEIPT REQUESTED

July 12, 1962

Mr. A. B. Fortner, Jr., President
Fortner Enterprises, Inc.
4123 South Third Street
Louisville, Kentucky

Dear Mr. Fortner:

Re: Loan Nos. 1568 and 1602

Reference is made to the subject loans which were consummated with your company under Loan Agreements dated October 28, 1960, and August 2, 1961, respectively, and which are evidenced by the following notes with outstanding balances and which are secured by the following mortgages:

Loan No. 1568

1. Land Note No. 2 dated October 28, 1960, maturing December 31, 1962.

2. Construction Note No. 1 dated October 28, 1960, which note, as extended, matured June 1, 1962.

3. Construction Note No. 2 dated October 28, 1960, maturing December 31, 1962.

4. Mortgage Deed dated October 28, 1960, securing the aforementioned notes.

Loan No. 1602

1. Land Note dated August 2, 1961, maturing December 31, 1962.

2. Collateral Note dated August 2, 1961, maturing December 31, 1962.

3. Mortgage Deed dated August 2, 1961, securing the aforementioned notes.

*Complaint*

In view of your failure to pay the outstanding balance on Construction Note No. 1 on or before maturity and in view of your further failure to pay interest on the Land Notes evidencing both loans as required under the provisions of the Notes, Mortgages, and Loan Agreements, the amounts outstanding under all Notes evidencing your loans, together with the interest accrued thereon, are hereby declared to be due and payable pursuant to the provisions of said Notes, Mortgages, and Loan Agreements and demand for payments thereof is made herewith.

There is set forth below the outstanding principal balance due on all notes, and interest accrued thereon through July 12, 1962, and the daily interest accrual rate:

| Note | Loan | Principal Outstanding | Interest accrued through 7/12/62 | Daily Interest Accrual |
|---|---|---|---|---|
| Land #2 | 1568 | $183,157.60 | $2,520.39 | $30.53 |
| Construction #1 | 1568 | 32,652.00 | 1,053.60 | 5.44 |
| Construction #2 | 1568 | 82,435.45 | 2,902.76 | 12.59 |
| Land | 1602 | 52,400.00 | 681.20 | 8.73 |
| Collateral | 1602 | 2,950.00 | | 8.73 |

It will be appreciated if you will promptly remit to this office the above amounts in full payment of your obligations in order to avoid the necessity of placing this matter in the hands of our attorney for collection.

WLR/df

Very truly yours,

/s/ W. L. Rollins
W. L. Rollins
Assistant General Manager



**ANSWER AND COUNTER-CLAIM—**
**Filed September 11, 1962.**

**ANSWER**

United States Steel Corporation, a New Jersey corporation, incorrectly designated in the complaint as a Delaware corporation, and U. S. Steel Homes Credit Corporation, incorrectly designated in the complaint as United States Steel Homes Credit Corporation, for answer to the complaint:

**FIRST DEFENSE**

1. Deny the allegations of Paragraph 1 of the complaint except they admit plaintiff seeks to invoke jurisdiction herein on the basis of the statutory provisions mentioned in said Paragraph 1 of the complaint.

2. Deny the allegation that United States Steel Corporation is organized under the laws of the State of Delaware found in Paragraph 5 of the complaint and further deny that the defendant United States Steel Corporation has been engaged in the business of manufacturing, purchasing and selling, on a nation wide basis, prefabricated houses and component parts. United States Steel Corporation affirmatively states that it has engaged in the business of manufacturing, purchasing and selling components parts for prefabricated houses and in some parts of the United States, all of which are located east of the Rocky Mountains, except Texas and north of the tier of states along the Gulf of Mexico. The defendants further deny the allegations found in Paragraph 5 of the complaint to the effect that the prefabricated houses and component parts thereof are constructed basically of steel, affirmatively pleading in this regard that materials other than steel are principally employed therein.

3. Deny the allegations found in Paragraph 7 of the complaint.

4. Deny the allegations found in Paragraph 8 of the complaint, but allege that within the period of time covered by the complaint, the defendant United States Steel Corporation, through its United States Steel Homes Division, manufactured and purchased components parts for United States Steel Homes at its factory at New Albany, Indiana, and that United States Steel Homes Division shipped component parts for United States Steel Homes in interstate commerce from its factory at New Albany, Indiana to the plaintiff and others in Louisville, Jefferson County, Kentucky.

5. Deny the allegations found in Paragraph 9 of the complaint, but allege that United States Steel Homes Division has shipped or transported into and sold component parts for United States Steel Homes in Louisville, Jefferson County, Kentucky from its New Albany, Indiana factory within the period of time covered by the complaint.

6. Deny the allegations found in Paragraph 10 of the complaint.

7. Deny the allegations found in Paragraph 11 of the complaint, but allege that U. S. Steel Homes Credit Corporation transacted business in various states of the United States, and in Louisville, Jefferson County, Kentucky, where it loaned sums of money and entered into contracts and loan agreements affecting the components of the United States Steel Homes shipped and sold in interstate commerce.

8. Deny the allegations found in Paragraph 12 of the complaint.

9. Deny the allegations found in Paragraph 13 of the complaint.

10. Deny the allegations found in Paragraph 14 of the complaint, except that they admit plaintiff entered into a contract with defendant U. S. Steel Homes Credit Corporation, whereby plaintiff borrowed certain sums of money from U. S. Steel Homes Credit Corporation, and that among other things, said agreement provided that the plaintiff agreed "To complete the development of the Premises and to erect on each of said Lots, free from all mechanics' liens, within one year of the date of the Notes and Mortgage, a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation . . . .", as is more fully set out in Exhibit A to the complaint.



11. Deny the allegations found in Paragraph 15 of the complaint, except that they allege that the aforementioned loan agreement contemplated that the plaintiff would construct in the Golden Meadows Subdivision, Jefferson County, Kentucky, approximately 186 single-family dwellings utilizing products of United States Steel Homes Division, United States Steel Corporation.

12. Deny the allegations found in Paragraph 16 of the complaint.

13. Deny the allegations found in Paragraph 17 of the complaint.

## COUNTER-CLAIM

U. S. Steel Homes Credit Corporation for counter-claim against the plaintiff states:

1. Heretofore on or about October 28, 1960, plaintiff executed and delivered to U. S. Steel Homes Credit Corporation its three promissory notes, each dated October 28, 1960 and further described below:

(a) One note mentioned above is in the face amount of $231,920 and bears interest at the rate of 6% per annum of the unpaid balance thereof. After certain advances by U. S. Steel Homes Credit Corporation and partial repayment by the plaintiff, there is presently outstanding on this note an unpaid balance of $169,-

957.60. As of September 6, 1962, this note had accrued interest charges of $4,170.47 and thereafter the daily accrual of interest is $28.33. A photostatic copy of said note is filed herewith as a part hereof marked for reference "Land Note Number 2, 1960."

(b) The second note mentioned above is in the face amount of $373,200 and bears interest at the rate of 6% per annum on the unpaid balance thereof. After certain advances by U. S. Steel Homes Credit Corporation and partial repayment by the plaintiff, there is presently outstanding on this note an unpaid balance of $25,402.50. As of September 6, 1962, this note had accrued interest charges of $1,043.64 and thereafter the daily accrual of interest is $4.23. A photostatic copy of said note is filed herewith as a part hereof marked for reference "Construction Note Number 1, 1960."

(c) The third note mentioned above is in the face amount of $1,362,180 and bears interest at the rate of 6% per annum on the unpaid balance thereof. After certain advances by U. S. Steel Homes Credit Corporation and partial repayment by the plaintiff, there is presently outstanding on this note an unpaid balance of $53,334.50. As of September 6, 1962, this note had accrued interest charges of $2,671.30 and thereafter the daily accrual interest is $8.89. A photostatic copy of said note is filed herewith as a part hereof marked for reference "Construction Note Number 2, 1960."

2. As security for the three notes mentioned in Paragraph 1 above, plaintiff executed and delivered to U. S. Steel Homes Credit Corporation a mortgage under date of October 28, 1960 now of record in Mortgage Book 395, Pages 314 in the office of the Clerk of the Jefferson County Court, Kentucky. This mortgage encumbers certain real property in Jefferson County, Kentucky as more fully set



forth therein. A photostatic copy of said mortgage is filed herewith and marked for reference "Exhibit Mortgage, 1960."

3. Since the recording of the mortgage described in Paragraph 2 immediately above, certain properties have been released from the encumbrance of such mortgage and are now no longer affected thereby. The properties still encumbered by the mortgage mentioned in Paragraph 2 above, located in Jefferson County, Kentucky, may be described as:

Parcel 1.

BEING Lots No. 29 and 72, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 1-A, as it is recorded in Plat and Subdivision Book 15, Page 1, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 2.

BEING Lots No. 22, 23, 24, 48, 49, 53, 54, and 55, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 1-B, as it is recorded in Plat and Subdivision Book 15, Page 33, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 3.

BEING Lots No. 98, 99, 100, 101, 102, and 103, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 1-C, as it is recorded in Plat and Subdivision Book 15, Page 42, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 4.

BEING Lots No. 418 and 419, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 4-A,

as it is recorded in Plat and Subdivision Book 14, Page 81, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 5. (Formerly Parcel 6)

BEGINNING at a point in the Southerly line of the tract conveyed to Rt. Rev. John Floersh by Deed of record in Deed Book 3349, Page 439, in the Jefferson County Court Clerk's Office, said point being the Northeasterly corner of Golden Meadows, Section 4-A, as shown on the plat of same, which plat is of record in Plat and Subdivision Book 14, Page 81, in the aforementioned Clerk's Office; thence with the Southerly line of the tract conveyed to the Rt. Rev. John Floersh aforementioned, South 65 degrees 58 minutes East 756.25 feet and South 65 degrees 00 minutes East 140.97 feet, South 3 degrees 40 minutes west 386.18 feet to a corner of and in the line of the remaining lands of E. M. Houchin; thence with several lines of said Houchins, North 65 degrees 00 minutes West 691.08 feet, South 20 degrees 31 minutes West 758.26 feet, and North 63 degrees 25 minutes West 321.80 feet to the Southeasterly corner of Golden Meadows, Section 4-A hereinabove mentioned; thence with several lines of said Golden Meadows, Section 4-A as follows: North 20 degrees 31 minutes East 384.74 feet, North 69 degrees 01 minutes West 140.0 feet, North 20 degrees 31 minutes East 60.0 feet, South 69 degrees 01 minute East 140.0 feet, and North 20 degrees 31 minutes East 652.94 feet to the place of beginning.

Parcel 6. (Formerly Parcel 7)

BEING Lot 78, Lots 85 through 97, inclusive, Lot 175, Lots 177 through 181, inclusive, Lots 183 through 185, inclusive, Lots 191, 192, and 194, Lots 197 through 201,



inclusive, Lots 203 through 207, inclusive, Lots 213, 214, and 216, Lot 390, Lots 392 through 409, inclusive, Lots 411 and 412, Lots 474 through 483, inclusive, Golden Meadows, Section 1-D, of record in Plat and Subdivision Book 18, Page 2, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

4. The mortgage described in Paragraph 2 above constitutes a lien on the property described in Paragraph 3 above prior and superior to all other liens on the property, except any liens for taxes.

5. In accordance with the terms of the notes and mortgage mentioned in Paragraphs 1 and 2 above, plaintiff is now indebted to U. S. Steel Homes Credit Corporation by way of principal the aggregate sum of $248,694.60, together with appropriate interest thereon. Some of this principal and interest according to the terms of said notes and mortgage is now immediately due and payable. Despite requests therefor, such has not been paid. In accordance with the precipitation clause in said notes and mortgage, U. S. Steel Homes Credit Corporation now elects to declare plaintiff's entire indebtedness in the aggregate sum of $248,694.60 immediately due and payable, together with accrued interest in the aggregate amount of $7,885.41 to September 6, 1962 with daily accrual of interest thereafter in the amount of $41.45 until paid.

6. Louisville Mortgage Service Company may be claiming an interest in Lot 205, Golden Meadows, Section 1-D, by virtue of a mortgage in its favor dated August 29, 1962 of record in Mortgage Book 523, Page 126, in the Office of the Clerk of the Jefferson County Court, Kentucky.

7. Heretofore on or about August 2, 1961, plaintiff executed and delivered to U. S. Steel Homes Credit Corporation its two promissory notes, each dated August 2, 1961 and further described below:

(a) One note mentioned above is in the face amount of $59,000 and bears interest at the rate of 6% per annum on the unpaid balance thereof. After certain advances by U. S. Steel Homes Credit Corporation and partial repayment by the plaintiff, there is presently outstanding on this note an unpaid balance of $52,400. As of September 6, 1962, this note had accrued interest charges of $1,170.26 and thereafter the daily accrual of interest is $8.73. A photostatic copy of said note is filed herewith as a part hereof marked for reference "Land Note, 1961."

(b) The other note mentioned above is in the face amount of $2,950 and bears no interest until maturity. A photostatic copy of said note is filed herewith as a part hereof marked for reference "Collateral Note, 1961."

8. As security for the two notes mentioned in Paragraph 7 above, plaintiff executed and delivered to U. S. Steel Homes Credit Corporation a mortgage under date of August 2, 1961 now of record in Mortgage Book 444, Page 88, in the office of the Clerk of the Jefferson County Court, Kentucky. This mortgage encumbers certain real property in Jefferson County, Kentucky as more fully set forth therein. A photostatic copy of said mortgage is filed herewith and marked for reference "Exhibit Mortgage 1961."

9. Since the recording of the mortgage described in Poragraph 8 immediately above, certain properties have been released from the encumbrance of such mortgage and are now no longer affected thereby. The properties still encumbered by the mortgage mentioned in Paragraph 8 above, located in Jefferson County, Kentucky, may be described as:



Parcel 1.
BEING Lot Number 271, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 2-A, as it is recorded in Plat and Subdivision Book 13, Page 97, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 2.
BEING Lots Number 360 and 362, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 2-B-1, as it is recorded in Plat and Subdivision Book 15, Page 14, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

Parcel 3.
BEING Lots Number 298, 299, 300, 301, 302, 303, 318, 320, 321, 322, 326, 327, 329, 330, 331, 332, 333, 334, 337, 338, 346, 347, 350, 351, 352, and 369, as shown and designated on the Plat of GOLDEN MEADOWS, SECTION 2-B-2, as it is recorded in Plat and Subdivision Book 16, Page 41, in the Office of the Clerk of the County Court of Jefferson County, Kentucky.

10. The mortgage described in Paragraph 8 above constitutes a lien on the property described in Paragraph 9 above prior and superior to all other liens on the property, except any liens for taxes.

11. In accordance with the terms of the notes and mortgage mentioned in Paragraphs 7 and 8 above, plaintiff is now indebted to U. S. Steel Homes Credit Corporation by way of principal the aggregate sum of $55,350, together with appropriate interest thereon. Some of this interest according to the terms of said notes and mortgage was due and payable on or before July 12, 1962. Despite requests therefor, such has not been paid. In accordance with the precipitation clause in said notes and mortgage

U. S. Steel Homes Credit Corporation elected, on July 12, 1962, to declare plaintiff's entire indebtedness in the aggregate sum of $55,350 immediately due and payable, together with accrued interest in the amount of $1,198.29 to September 6, 1962 with daily accrual of interest thereafter in the amount of $9.22 until paid.

12. Louisville Mortgage Service Company may be claiming an interest in Parcel 1 described in Paragraph 9 above, by virtue of a mortgage in its favor dated August 29, 1962 of record in Mortgage Book 523, Page 124, in the Office of the Clerk of Jefferson County Court, Kentucky.

WHEREFORE, the defendants and each of them, pray the complaint against them be dismissed. The defendant, U. S. Steel Homes Credit Corporation, prays for judgment against the plaintiff in the amount of $313,128.30, representing principal in the amount of $304,044.60 and accrued interest in the amount of $9,033.70 and for a judgment of daily accrual of interest in the amount of $50.67 from and after September 6, 1962 until paid, that it have a lien prior and superior to all other liens on said real property presently encumbered by the two mortgages mentioned in the Counter-Claim, that Louisville Mortgage Service Company mentioned in Paragraphs 6 and 12 of the Counter-Claim, if it be made party to the within action, appear and set forth any claims that it may have as to the real property described above or upon its failure to do so be forever barred, that the liens of U. S. Steel Homes Credit Corporation be enforced and the said real property to which those respective liens attach be sold by order of this court free and clear of all liens and claims, except easements and restrictions of record, and taxes not yet due and payable and the proceeds thereof be applied toward payment of the U. S. Steel Homes Credit Corporation's judgment against plaintiff. The defendants, and each of them, further pray



for their costs herein expended and for all other relief to which they may appear to be entitled.

Albert F. Reutlinger
Attorney for Defendants
501 South Second Street
Louisville 2, Kentucky
584-1135

Middleton, Seelbach, Wolford,
Willis and Cochran
Of Counsel

## MORTGAGE NOTE

$231,920.00 — Louisville, Kentucky
October 28, 1960

On or before December 31, 1962, for value received, the unlersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of TWO HUNDRED THIRTY-ONE THOUSAND NINE HUNDRED TWENTY DOLLARS ($231,920.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum, said interest being payable monthly on the first day of each month commencing January 1, 1961.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof

by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner
President

ATTEST:

/s/ Edna Herberman
Secretary

Land Note Number 2, 1960



MORTGAGE NOTE

$373,200.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1961, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of THREE HUNDRED SEVENTY-THREE THOUSAND TWO HUNDRED DOLLARS ($373,200.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or madify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner
President

ATTEST:

/s/ Edna Herberman
Secretary

Construction Note Number 1, 1960

MORTGAGE NOTE

$1,362,180.00 Louisville, Kentucky
October 28, 1960

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of ONE MILLION THREE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED EIGHTY DOLLARS ($1,362,180.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain



Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of any event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner
President

ATTEST:

/s/ Edna Herberman
Secretary

Construction Note Number 2, 1960

MORTGAGE DEED

BOOK 395 PAGE 314

THIS MORTGAGE, between FORTNER ENTERPRISES, INC., a Kentucky corporation having a principal place of business in the City of Louisville, County of Jefferson, and State of Kentucky, GRANTOR, and U. S. Steel Homes Credit Corporation, a Delaware corporation having a place of business in the City of New Albany, County of Floyd, and State of Indiana, GRANTEE:

WITNESSETH: Whereas GRANTOR desires to secure certain obligations to GRANTEE by mortgaging certain real estate;

NOW, THEREFORE, GRANTOR, for the purposes herein described, intending to be legally bound hereby, and in consideration of TEN and NO/100 DOLLARS ($10.00) received to its full satisfaction from GRANTEE, does hereby grant, bargain, sell, and convey to GRANTEE, its successors and assigns, the following described real estate, to-wit:

Situate in the County of Jefferson, State of Kentucky, and being more particularly described as follows, to-wit:

PARCEL 1

Lot Nos. 29 and 72 as shown and designated on the plat of Golden Meadows Section 1-A as it is recorded in Plat and Subdivision Book 15, Page 1, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 2

Lot Nos. 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 48, 49, 50, 51, 52, 53, 54, and 55 as shown and designated on the plat of Golden Meadows Section 1-B as it is recorded in Plat and Subdivision Book 15 Page 33, nithe office of the Clerk of the County Court of Jefferson County, Kentucky;



PARCEL 3

Lot Nos. 98, 99, 100, 101, 102, 103, and 104 as shown and designated on the plat of Golden Meadows Section 1-C as it is recorded in Plat and Subdivision Book 15, Page 42, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 4

BOOK 395 PAGE 315

Lot Nos. 418, 419, and 710 as shown and designated on the plat of Golden Meadows Section 4-A as it is recorded in Plat and Subdivision Book 14, Page 81, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 5

Beginning at a point in the South line of Constance Drive as shown on the plat of Golden Meadows Section 1-B, which plat is of record in Plat and Subdivision Book 15, Page 33 in the Jefferson County Court Clerk's Office, at a corner common to Golden Meadows Section 1-A as shown on the plat of same of record in Plat and Subdivision Book 15, Page 1 in said Clerk's Office, thence with the South line of said Constance Drive North 81°15′ East 272.23 feet, thence South 8°45′ East 130.0 feet, thence North 81°15′ East 75.0 feet to a point in the center of a ditch, thence with said ditch South 8°45′ East 234.97 feet and South 5°22′ East 455.77 feet to the Northeasterly corner of the tract conveyed to the Rt. Rev. John Floersch recorded in Deed Book 3349, Page 439; thence with the North line of said tract North 65°58′ West 681.51 feet to the Southeasterly corner of Golden Meadows, Section 1-A hereinabove mentioned, thence with the Easterly line of said Golden Meadows, Section 1-A North 20°31′ East 516.90 feet to the place of beginning;

PARCEL 6

Beginning at a point in the Southerly line of the tract conveyed to Rt. Rev. John Floersch by deed of record in Deed Book 3349, Page 439, in the Jefferson County Court Clerk's Office, said point being the Northeasterly corner of Golden Meadows, Section 4-A as shown on the plat of same, which plat is of record in Plat and Subdivision Book 14, Page 81 in the aforementioned Clerk's Office, thence with the Southerly line of the tract conveyed to the Rt. Rev. John Floersch aforementioned, South 65°58′ East 756.25 feet and South 65°00′ East 140.97 feet, South 3°40′ West 386.18 feet to a corner of and in the line of the remaining lands of E. M. Houchin, thence with several lines of said Houchins North 65°00′ West 691.08 feet, South 20°31′ West 758.26 feet and North 63°25′ West 321.80 feet to the Southeasterly corner of Golden Meadows, Section 4-A hereinabove mentioned, thence with several lines of said Golden Meadows, Section 4-A as follows, North 20°31′ East 384.74 feet, North 69°01′ West 140.0 feet, North 20°31′ East 60.0 feet, South 69°01′ East 140.0 feet and North 20°31′ East 652.94 feet to the place of beginning;

PARCEL 7

Beginning at an iron pipe at the corner common to Golden Meadows, Section 1-B, the plat of which is recorded in Plat and Subdivision Book 15, Page 33 in the Jefferson County Clerk's Office, and Golden Meadows, Section 1-C as shown by the Revised plat of same of record in Plat and Subdivision Book 15, Page 42 in said Clerk's Office, thence with several lines of said Golden Meadows, Section 1-C as follows, South 8°38′ East 673.92 feet, South 4°32′ West 175.69 feet, South 25°02′ West 850.90 feet, North 65°00′ West 283.48 feet, North 84°30′ West 105.83 feet, North 34°18′ West 97.53 feet and North 86°21′ West 130.0 feet



to a point in the center of a drainage ditch; thence with the center of said drainage ditch North 3°40′ East 45.47 feet, North 5°22′ West 974.10 feet and North 8°45′ West 234.97 feet to a point in the Southerly line of Golden Meadows, Section 1-B as hereinabove mentioned, thence with several lines of said Golden Meadows, Section 1-B as follows, North 81°15′ East 444.68 feet, North 8°38′ West 130.0 feet, North 81°15′ East 60.0 feet, South 8°38′ East 100.0 feet, North 81°22′ East 135.07 feet, South 8°45′ East 29.77 feet and North 81°15′ East 314.72 feet to the place of beginning.

BOOK 395 PAGE 316

TO HAVE AND TO HOLD the said premises, with all appurtenances, to GRANTEE, its successors and assigns, with covenants of General Warranty, to secure:

FIRST: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of EIGHTY-EIGHT THOUSAND DOLLARS ($88,000.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable on the first day of each month beginning January 1, 1961, it being expressly agreed in said note that said principal sum and interest then unpaid shall be due and payable on or before December 31, 1961, it being expressly agreed therein that the whole of said principal sum and interest then unpaid may be declared and become due and payable in the event of default as therein defined;

SECOND: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of TWO HUNDRED THIRTY-ONE THOUSAND NINE HUNDRED TWENTY DOLLARS ($231,920.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable

on the first day of each month beginning January 1, 1961, it being expressly agreed in said note that said principal sum and interest then unpaid shall be due and payable on or before December 31, 1962, it being expressly agreed therein that the whole of said principal sum and interest then unpaid may be declared and become due and payable in the event of default as therein defined;

THIRD: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of THREE HUNDRED SEVENTY-THREE THOUSAND TWO HUNDRED DOLLARS ($373,200.00), with the interest at the rate of six per centum (6%) per annum computed from the date of each advance, it being expressly agreed in said note that said principal sum together with said interest shall be due and payable on or before December 31, 1961, it being expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

FOURTH: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of ONE MILLION THREE HUNDRED SIXTY-TWO THOUSAND ONE HUNDRED EIGHTY DOLLARS ($1,362,180.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, it being expressly agreed in said note that said principal sum together with said interest shall be due and payable on or before December 31, 1962, it being expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

FIFTH: Payment by GRANTOR to GRANTEE of all sums expended or advanced by GRANTEE pursuant to this Mortgage or the Loan Agreement entered into between the parties of even date herewith;



SIXTH: Performance of each undertaking of GRANTOR contained herein, and performance of each undertaking of GRANTOR contained in said Loan Agreement;

SEVENTH: Payment by GRANTOR to GRANTEE of all other indebtedness, direct or contingent, now or hereafter owing by GRANTOR to GRANTEE.

FOR THE CONSIDERATION AFORESAID, GRANTOR covenants and agrees that:

FIRST: GRANTOR is lawfully seized in fee simple of said premises and has good right to sell and convey the same as aforesaid; said premises are free of all encumbrances, except liens for taxes and assessments not yet due and payable and any building and use restrictions of record; and GRANTOR will warrant and defend the title to the premises forever against the claims and demands of all persons whomsoever.

SECOND: GRANTOR shall keep all buildings and other insurable property now or hereafter erected or placed in or on said mortgaged property insured against fire and other hazards, as undertaken in the aforementioned Loan Agreement.

THIRD: GRANTOR will maintain the mortgaged property free from any waste or nuisance, and will do all things necessary to maintain said property in good condition, and will pay when due all claims for labor performed and material furinshed, and will not permit any lien for mechanics or materialmen to attach to the mortgaged property.

FOURTH: GRANTOR will pay, before they become delinquent, all taxes and assessments lawfully imposed upon the mortgaged property, and will promptly at the request of GRANTEE deliver to GRANTEE the receipt for such payment.

FIFTH: If GRANTOR fails to pay any taxes, assessments, liens, or insurance premiums when the same are due and payable, or otherwise defaults in the performance of any other covenant hereunder or under the said Loan Agreement, the security hereby created shall then become enforceable. GRANTEE may thereupon pay any such sums and perform any such covenants in respect of which there has been a default, and GRANTOR agrees promptly to repay any sums so advanced, without demand, with interest at the rate of six per centum (6%) per annum from the date of such advances, and such sums so advanced, with such interest, shall be secured hereby, but no such advance shall relieve GRANTOR of the consequences of any such default.

SIXTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may declare all sums secured hereby immediately due and payable, and GRANTOR shall then pay said sums forthwith.

SEVENTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may take possession of the mortgaged property, manage it and collect rents therefrom and apply same, less reasonable collection costs, upon the indebtedness hereby secured, and all leases and rents of the mortgaged property, after the security become enforceable, are hereby assigned and mortgaged to GRANTEE as additional security for the indebtedness secured hereby.

EIGHTH: GRANTOR will not claim the benefit of any stay, extension, appraisement, or redemption law now or at any time hereafter in effect.

PROVIDED, ALWAYS, that if GRANTOR pays to GRANTEE the principal and interest on said notes, when and as the same shall become due and payable, and pays any and all other sums payable under said notes or under this Mortgage or secured by this Mortgage, this conveyance



shall thereupon become null and void, and in such case GRANTEE shall execute and deliver to GRANTOR, at GRANTOR'S cost, an appropriate release and discharge of this Mortgage in form to be recorded.

IN WITNESS WHEREOF, GRANTOR in pursuance of a resolution adopted by its Board of Directors on the 26th day of October, 1960 has hereunto caused its corporate name to be affixed and these presents to be subscribed by its President and Secretary this 28th day of October, 1960.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner
President

/s/ Edna Herberman
Secretary

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS.

BOOK 395 PAGE 317

I, a Notary Public in and for the County and State aforesaid do certify that on this day the foregoing Mortgage from Fortner Enterprises, Inc., to U. S. Steel Homes Credit Corporation was produced before me and acknowledged and delivered before me by A. B. Fortner, Jr. as President of Fortner Enterprises, Inc., a corporation, party thereto, to be the act and deed of said corporation by him as its President, thereunto duly authorized, and the seal of said corporation as affixed to said deed was attested and proven before me by Edna Herberman, as its Secretary.

Given under my hand and seal of office this 28th day of October, 1960.

/s/ Samuel Steinfeld
Notary Public, Jefferson County, Kentucky.

(Seal)

MORTGAGE NOTE

$59,000.00 Louisville, Kentucky
August 2, 1691

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of FIFTY-NINE THOUSAND DOLLARS ($59,000.00), with interest at the rate of six per centum (6%) per annum, computed from the date of each advance, said interest being payable on the first day of each month beginning September 1, 1961.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as detailed in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest,



notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.
By /s/ A. B. Fortner
President

ATTEST:
/s/ Edna Herberman
Secretary

Land Note, 1961

MORTGAGE NOTE

$2,950.00 Louisville, Kentucky
August 2, 1961

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of TWO THOUSAND NINE HUNDRED FIFTY DOLLARS ($2,950.00), without interest. After maturity, interest shall be paid monthly on the first day of each month at the rate of six per centum (6%) per annum on all amounts which shall have been disbursed hereon and remain unpaid.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain

Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as detailed in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By /s/ A. B. Fortner
President

ATTEST:

/s/ Edna Herberman
Secretary

Collateral Note, 1961



**AMENDED COMPLAINT**—Filed January 21, 1966.

Comes the plaintiff, Fortner Enterprises, Inc., and for its Amended Complaint against the defendants herein states:

1. That it repeats and reiterates as if fully copied herein all paragraphs of the Complaint as originally filed.

2. In addition to the loan agreement and mortgage described in paragraphs 14 through 16 of the original Complaint, on August 2, 1961 this plaintiff, in order to further avail itself of the services of U. S. Steel Homes Credit Corporation, entered into an additional contract with the U. S. Steel Homes Credit Corporation by the terms of which said defendant agreed to loan this plaintiff certain sums of money, one of the conditions of that agreement being that plaintiff was required ". . . to complete development of the premises and to erect on each of said lots free from all mechanic's liens prefabricated dwelling houses manufactured by the United States Steel Homes Division, U. S. Steel Corporation. (A copy of said loan agreement is attached hereto and made a part hereof as if fully copied herein and is marked Exhibit D.)

3. The aforesaid loan agreement of August 2, 1961 was executed at the time plaintiff had just begun building homes in said housing development. The defendant, U. S. Steel Homes Division, U. S. Steel Corporation, furnished this plaintiff with faulty, defective and unusable material for the construction of the houses to be erected on the lots which were the subject matter of the loan agreement of August 2, 1961. It was anticipated by the terms of the aforementioned loan agreement that this plaintiff would construct approximately thirty-two (32) houses on the thirty-two lots described in said loan agreement in addition to the one hundred eighty seven (187) houses which were to be constructed on the lots and land described in the loan

agreement of October 28, 1960. After construction of seventy (70) houses on lots located in the description of the October 28, 1960 loan agreement or the August 2, 1961 loan agreement, because of the faulty and defective material furnished by the defendant, United States Steel Homes Division, U. S. Steel Corporation, this plaintiff has been unable to complete said project.

4. In order to effectuate the aforementioned contract, combination and conspiracy the defendant, U. S. Steel Homes Credit Corporation threatened and continued to foreclose the mortgages held by it under the terms of the aforementioned loan agreements, even though plaintiffs inability to continue performance was directly caused by the illegal acts of the defendant. The defendant U. S. Steel Homes Credit Corporation has since the filing of the original Complaint herein forclosed upon the property which was the subject matter of the loan agreements described above and in the original Complaint and has caused said property to be sold at a foreclosure sale for the sum of $208,562.69. The property upon which said defendant foreclosed had a fair market value of $261,300.00, as of the date of said foreclosure sale, and the aforesaid defendants as a result of their illegal acts have caused the plaintiff herein to be damaged in addition to plaintiff's other damages in the difference between the sale price in said foreclosure action and the fair market value of said property, or $52,737.31. This action has resulted in irrepairable injury, harm and damage to the plaintiff as alleged in plaintiff's original Complaint filed herein. (A copy of the mortgage dated August 2, 1961, is attached hereto and is marked Exhibit E.)

5. As a direct and proximate result of the contract, combination and conspiracy and violation of the antitrust laws set forth herein and in the original Complaint filed herein, the defendants have caused the plaintiff:



A. To purchase United States Steel Homes at unreasonably high prices.

B. To expend additional sums on each house built to date to repair or replace the damage caused by the faulty, defective and unusuable material furnished by United States Steel Homes Division, United States Steel Corporation.

C. To be delayed in the completion of the homes planned to be built in the aforesaid development to the extent that plaintiff is now unable to go forward with the development.

D. To have lost profits on homes already built and to lose profits on the homes contemplated by the parties to be built which plaintiff has been unable to build, both in the amount of approximately $900.00 per each of the 219 houses, or a total of $197,100.00.

E. To have its reputation as a developer and builder irreparably damaged due to the inferior homes built as a result of the defective materials furnished plaintiff.

F. To be unable to purchase prefabricated steel homes or their component parts from other manufacturers.

G. To have caused the property of the plaintiff to be sold at a value below the fair and reasonable market value of said property at a loss to the plaintiff of $52,737.31.

6. Plaintiff further states that defendant, U. S. Steel Homes Credit Corporation is claiming as of May 12, 1965 that plaintiff owes said defendant a balance of principal and accrued interest of $88,733.60. Said alleged claim against the plaintiff was caused and brought about by the illegal conduct of the defendants as set forth herein and in the original Complaint filed herein and said defendants

should be further barred from asserting said claim against the defendant.

WHEREFORE, plaintiff, Fortner Enterprises, Inc., demands:

1. Judgment against the defendants, United States Steel Corporation and United States Steel Homes Credit Corporation for treble the sum of $249,837.31, being the amount of damages plaintiff has incurred as a result of the defendants illegal acts, a reasonable fee for the services of its attorneys in prosecuting this action, and its costs herein expended.

2. For a decree against the defendants permanently enjoining and prohibiting their enforcement of the provision or provision of the aforementioned loan agreement which require plaintiff to construct the prefabricated houses in this development exclusively out of products furnished by United States Steel Homes Division, United States Steel Corporation.

3. That the plaintiff be awarded all other just and proper relief to which it may appear entitled.

4. That the alleged claim of the defendant, U. S. Steel Homes Credit Corporation against the plaintiff be held null, void and unenforceable.

/s/ Kenneth L. Anderson
/s/ A. Scott Hamilton, Jr.

EXHIBIT D.

LOAN AGREEMENT

THIS AGREEMENT, made this 2 day of August, 1961, by and between FORTNER ENTERPRISES, INC., a Kentucky corporation, (hereinafter called the "Borrower") and U. S. Steel Homes Credit Corporation, a Delaware corporation, having an office in New Albany, Indiana, (hereinafter called the "Lender");



WITNESSETH:

WHEREAS, Borrower has acquired, or will acquire, fee simple title to thirty-two (32) fully developed building lots situated in Golden Meadows Subdivision, Jefferson County, Kentucky, more particularly described in the mortgage of even date herewith, (hereinafter referred to as the "Premises" and/or "Lots"); and

WHEREAS, Borrower intends to construct on each of said Lots a single-family dwelling utilizing products of United States Steel Homes Division, United States Steel Corporation; and

WHEREAS, Borrower has applied for a loan to assist in refinancing indebtedness presently existing against said Lots, to provide working capital funds, and to finance the contsruction of dwellings on said Lots;

NOW, THEREFORE, in consideration of the mutual promises hereinafter contained and of other valuable considerations, the parties hereto agree as follows:

PART A.

1. The Borrower agrees to take and the Lender agrees to make a loan in the principal sum of FOUR HUNDRED SIXTY-FIVE THOUSAND THREE HUNDRED FIFTY DOLLARS ($465,350.00), to be advanced as hereinafter provided, said Loan being evidenced by:

a. Promissory Note of even date in the principal amount of FIFTY-NINE THOUSAND DOLLARS ($59,000.00), maturing December 31, 1962, and bearing interest on all disbursed and unpaid amounts thereof at the rate of six per centum (6%) per annum, payable monthly on the first day of each month beginning September 1, 1961, (said note being hereinafter referred to as the "Land Note");

b. Promissory Note of even date in the principal amount of FOUR HUNDRED THREE THOUSAND

FOUR HUNDRED DOLLARS ($403,400.00), maturing December 31, 1962, and bearing interest on all disbursed and unpaid amounts thereof at the rate of six per centum (6%) per annum, (said note being hereinafter referred to as the "Construction Note");

c. Promissory Note of even date in the principal amount of TWO THOUSAND NINE HUNDRED FIFTY DOLLARS ($2,950.00), maturing December 31, 1962, and bearing no interest on and prior to said maturity date, but bearing interest after said maturity date at the rate of six per centum (6%) per annum, payable monthly on the first day of each month, (said note being hereinafter referred to as the "Collateral Note"); and

d. Mortgage Deed of even date herewith conveying as security for the Land Note, Construction Note, and Collateral Note, the above described Premises, which Mortgage shall at all times constitute a valid and the only lien on the aforesaid Premises, except for taxes and assessments not overdue.

2. The Borrower agrees to do and perform the following acts and things:

a. To erect on the Lots, free from all mechanics' liens, on or prior to the maturity of the Land Note, the Construction Note, and the Collateral Note, a total of not less than twenty-seven (27) single-family dwellings consisting primarily of components produced and furnished by United States Steel Homes Division, United States Steel Corporation, (hereinafter called the "dwelling house") and to construct said dwelling houses in accordance with all applicable ordinances and statutes, use restrictions of record and in accordance with the requirements of all regulatory authorities and in conformity with the requirements of the Federal Housing



Administration (hereinafter referred to as "FHA") and/or the Veterans Administration (hereinafter referred to as "VA");

b. To furnish Lender with satisfactory evidence that Workmen's Compensation Insurance coverage of Borrower and/or its subcontractors required by applicable law has been provided, together with certificates evidencing public liability and property damage insurance in the amounts of $100,000.00 each person and $300,000.0 each accident for injuries to persons, and $50,000.00 each accident for damage to property.

c. To furnish fire and extended coverage insurance on each of the dwelling houses, in amount, form and in companies satisfactory to Lender, which insurance shall be payable to the Borrower, with standard mortgagee endorsement attached making loss payable to the Lender or its assigns at mortgagee;

d. To pay all taxes and assessments which are delinquent or in collection;

e. To allow Lender and its agents, until such time as the Loan is paid in full, the right of entry and free access to the Premises, the right to inspect all work done, labor performed and materials furnished, and to inspect all books, contracts and records of Borrower insofar as the same relate to the Premises;

f. To furnish Lender, upon request, a current statement of financial condition with such supporting detail as may be required by Lender;

g. To indemnify and hold and save harmless Lender from any and all loss, cost, damage, liability and expense, which it may suffer or incur, by reason of the perfecting of statutory liens, against any or all of the premises described in the said mortgage, on account of

work or labor performed or on account of the furnishing of machinery, material and fuel;

h. To pay to the Lender as hereinabove provided, a Service Fee of one-half of one per centum (½ of 1%) of the total aggregate amount of the Land Note and the Construction Note.

3. The Lender may require the Borrower to obtain and attach to each application for an advance on account of the Loan, acknowledgements of payment and releases of liens down to the time of the making of such advance, from all contractors and subcontractors and materialmen covering all work, labor, machinery, materials and fuel, done, performed or furnished in connection with the construction of any of the said dwelling houses.

4. Upon the occurrence of any of the following events:

a. The Borrower shall at any time prior to the completion of the said dwelling houses abandon the installation and/or construction thereof or shall cease work thereon for a period of more than seven (7) days, stoppage by reason of strikes, labor disputes, shortgages of materials and acts of God and other matters beyond its control excepted;

b. An order in aid of execution or attachment shall be served upon the Lender by any creditor of the Borrower and not released within five (5) days from the date thereof:

c. The Borrower shall fail to commence the construction of said dwelling houses within thirty (30) days after the date of the Notes and Mortgage, or within such additional number of days as the Lender may grant in writing;

d. An event of default as defined in the said Mortgage shall occur and subsist for the period of time, of



any, therein specified in respect thereof, and the Lender shall take any action to enforce its rights under the said Mortgage or the Notes secured thereby; or

e. The Borrower shall otherwise fail to comply with the terms of this Agreement or with the terms and provisions of the Notes or the Mortgage;

then and any such event, at the option of the Lender all obligation on its part to make further advances on account of the Loan shall cease, and the Lender may enter into possession of the premises and perform any and all work and labor necessary to erect said dwelling houses substantially according to the applicable plans and description of materials and employ watchmen to protect the premises.

5. The Lender does not assume and is hereby expressly released and discharged from any and all liability and responsibility whatsoever, which might or could arise out of the disbursement of the Loan or as to the method, manner or application of such disbursement, or as to mechanics' or materialmen's liens or any other liens whatsoever which might attach to or be filed against the aforesaid premises.

6. Within ten (10) days from the date of the Mortgage, and in any event prior to the Lender's disbursing any portion of the Loan to the Borrower, the Borrower at its own cost and expense, will cause to the issued and delivered by a qualified title insurance company (hereinafter called the "Title Company") to the Lender a mortgagee's policy of title insurance in standard ATA form incorporating those provisions set forth in Exhibit "A" attached hereto and made a part hereof. At the option of the Lender, all disbursements of the said Loan may be made through and under the supervision of Title Company and the Borrower agrees to do all acts and things necessary to comply with all conditions contained in the said policy, so that the Lender shall be entitled to the full benefit of the said policy

with respect to all amounts disbursed on account of the said Loan.

PART B.

1. The proceeds of the Land Note shall be disbursed as follows:

a. The first advance shall be in the amount of Two Thousand Three Hundred Twelve Dollars ($2,312.00), which sum representing the Service Fee due by Borrower to Lender under the provisions of Item 2. h. of PART A. above shall be paid by Lender to itself for the account of Borrower in payment of said Fee, and shall be made at the time of loan closing.

b. The remaining proceeds of the Land Note amounting to Fifty-six Thousand Six Hundred Eighty-eight Dollars ($56,688.00) shall be paid by Lender to the Title Company to be disbursed by it in payment of the outstanding indebtedness against the mortgaged premises amounting to Twenty-five Thousand Eight Hundred Twenty-five and 87/100 Dollars ($25,825.87) with the balance of said funds to be disbursed to Borrower, said disbursements to be made by Title Company simultaneously with the recordation of the Mortgage Deed of even date herewith to Lender covering the Premises and the issuance of the mortgagee's policy of title insurance referred to in Item 6. of PART A. above.

PART C.

1. For the purpose of allocating the proceeds of the Construction Note to be advanced to the Borrower hereunder, the maximum amount of such proceeds to be allocated to each of the proposed Lots covered by this Agreement shall be, as to each said sublot, whichever amount is the lesser of either that amount set forth in Column (3) on Exhibit "B" attached hereto, or that amount arrived at



by subtracting the pro-rata share of the proceeds of the Land Note allocated each of said sublots as set forth in Column (2) of said Exhibit "B", from eighty-five per centum (85%) of the valuation of the particular house and lot established by the FHA as the basis for the Commitment to Insure or VA Certificate of Reasonable Value issued therefor.

2. Prior to Lender's obligating itself to make payment of any house shipped for account of Borrower and prior to Lender's making the first or any subsequent advance of the amount of the proceeds of the Loan allocated to a given house and lot, Lender shall be in receipt of:

a. A copy of the FHA Commitment to Insure or VA Certificate of Reasonable Value applicable thereto; and

b. Satisfactory evidence that the house and lot in respect of which advance of loan proceeds is requested has been sold, that the purchaser thereof has made a cash deposit of not less than Ninety-nine Dollars ($99.00), and that a permanent investor has approved the purchaser as mortgagor in the amount of the mortgage to be originated and agrees to purchase said mortgage after it is duly endorsed for insurance by the FHA or guaranteed by the VA.

3. The proceeds of the Construction Note as allocated to each of the proposed Lots shall be disbursed as follows:

a. The first advance shall be made when as to a given house the concrete slab is installed and Lender is in receipt of (a) a sworn statement by a Registered Engineer showing that the slab in question is located wholly within the lot lines in accordance with the restrictions of record and zoning ordinances and (b) a copy of the FHA or VA First Compliance Inspection

Report showing no exceptions. The amount of the first advance shall be One Thousand Dollars ($1,000.00);

b. The second advance shall be made when as to a given house Lender is in receipt of a copy of the FHA or VA Second Compliance Inspection Report showing no exceptions. The second advance shall be One Thousand Dollars ($1,000.00) plus a sum equal to the purchase price of the dwelling house package, including sales tax and freight, as shown by the applicable Treasury Invoice of the United States Steel Homes Division, United States Steel Corporation. From the amount of each such second advance Lender shall pay on behalf of Borrower the amount shown to be due by said Treasury Invoice, to United States Steel Homes Division, United States Steel Corporation, for the account of the Borrower;

c. The third advance shall be made when as to a given house the finished floor is laid, interior trim installed, kitchen units installed, furnace and hot water heater installed, bath fixtures installed, and interior painting is completed. The third advance shall be an amount equal to ninety per centum (90%) of the maximum amount of the Construction Note so allocated less the amounts of the first two advances described above;

d. The final advance on account of the maximum amount of the proceeds of the Loan so allocated shall be one hundred per centum (100%) of said proceeds less the aggregate total of the three previous advances and shall be made when as to a given house all construction is completed and the Lender is in receipt of the final FHA or VA Compliance Inspection Report without exceptions save for those items for which suitable escrows have been established with the FHA or VA.



PART D.

1. Borrower's agreements contained in paragraph 2.b. of PART A. hereof constitute, and hereby are declared to constitute, an essential part of the consideration to Lender for the execution and delivery of this Loan Agreement, and the disbursement of proceeds of the Land Note and Construction Note as above provided.

2. The principal amount of the Collateral Note shall be disbursed concurrently with the execution and delivery of said note, shall be disbursed by Lender to itself for the account of Borrower, and shall be held in escrow by Lender for the purposes hereinafter stated and none other:

a. At such time on or before the maturity of said Collateral Note as Borrower shall have fully complied with its agreements contained in said paragraph 2. a. of PART A. hereof, then Lender shall promptly apply all such escrowed proceeds of the Collateral Note to the repayment of such note;

b. In the event such escrowed proceeds of the Collateral Note have not become qualified for application to the repayment of such note on or before the maturity of such note, as provided by sub-paragraph "a", above, then on the day following the maturity of said Collateral Note the Lender shall pay all such escrowed proceeds to itself, for its own account, as liquidated damages specifically for the breach of Borrower's agreements contained in the aforesaid paragraph 2. b. of PART A. hereof, without prejudice, however, to any of the rights of Lender for repayment of the Land Note, Construction Note, and Collateral Note, and interest thereon; and thereafter all right, title and interest of Borrower in and to such escrowed proceeds of the Collateral Note shall cease and determine, and shall be of no further force and effect whatever.

3. In no event shall the liability of Borrower under the Land Note, Construction Note, or Collateral Note exceed amounts actually disbursed and unpaid, and interest thereon.

PART E.

1. An individual written release of lien of mortgage from U. S. Steel Homes Credit Corporation for each of the lots duly and regularly platted within the premises described in said Mortgage shall be prepared in proper form and deposited with Title Company within sixty (60) days from the date of said Mortgage. Upon proof that the shell of a prefabricated single-family dwelling house manufactured by the United States Steel Homes Division of United States Steel Corporation has been erected by Borrower upon any given lot, then upon payment by Borrower to Title Company for the account of Lender of:

a. The sum of Two Thousand Two Hundred Dollars ($2,200.00) in partial repayment of the proceeds of the Land Note until said note is paid in full, and thereafter in partial repayment of the proceeds of the Collateral Note; and

b. An amount aggregating that portion of the proceeds of the Construction Note and interest accrued thereon advanced for construction of a dwelling on said lot;

the applicable release of lien of mortgage shall be placed on record in the Records of Mortgages for Jefferson County, Kentucky.

2. This agreement, together with the notes and mortgage hereinabove described, constitute the entire agreement between the Borrower and the Lender and no representations or agreements, express or implied, have been



made to or with the Borrower not herein contained. This Agreement shall not be amended or modified, nor may any of its terms or conditions be waived, except by an instrument in writing executed in the name of and on behalf of the Lender by one of its officers thereunto duly authorized.

3. Any notice or demand upon the Borrower shall be deemed to have been sufficiently given or served for all purposes hereof if mailed to Borrower by registered or certified mail addressed to 4125 South Third Street, Louisville, Kentucky, or such other address as the Borrower may furnish to the Lender for such purpose. Any notice or demand upon the Lender shall be deemed to have sufficiently been given or served for all purposes hereof if delivered personally to its Vice President or mailed to it for the attention of its Vice President by registered mail addressed to it at Mutual Trust and Deposit Building, 322 Pearl street, New Albany, Indiana, or at such other address as the Lender may furnish the Borrower for such purpose.

4. No right, interest or benefit of the Borrower hereunder may be assigned or otherwise transferred unless the written consent of the Lender shall first be obtained. Nothing in this Agreement, express or implied, shall confer upon any person, firm or corporation, other than the Lender, together with its successors or assigns, and the Borrower, together with its successors or assigns, subject to the limitation contained in the next preceding sentence, any right, remedy, or claim, legal or equitable, hereunder or by reason hereof; this Agreement and all of its covenants and conditions being intended to be and being for the sole and exclusive benefit of such persons specified as aforesaid.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed in duplicate the day and year first above written.

FORTNER ENTERPRISES, INC.

By _____

President

_____

Secretary

U. S. STELL HOMES CREDIT CORPORATION

By _____

Vice President

_____

Assistant Secretary

EXHIBIT "A"

(Attached to and made a part of Loan Agreement dated August , 1961, between Fortner Enterprises, Inc. and U. S. Steel Homes Credit Corporation)

Title Policy Provisions

The Mortgage Deed executed contemporaneously herewith shall be insured to the amount of the Loan as a first and valid lien against the property therein described except for the following:

1. Taxes and assessments not yet due and payable.
2. Such state of facts as would be disclosed by an accurate survey and inspection of the premises.

NOTE: Subject to other provisions of the Policy, the maximum liability of the insured may be limited to not less than the following respective amounts for the several lots designated on any duly recorded plat of the premises, namely:

Each Lot—$14,450.00



NOTE: The liability of the insurer under the policy shall be limited to actual amounts disbursed on the mortgage loan which the above referred to Mortgage Deed secures, but will increase as each disbursement is made up to the face amount of the policy.

EXHIBIT "B"

(Attached to and made a part of Loan Agreement dated August, 1961, between Fortner Enterprises, Inc. and U. S. Steel Homes Credit Corporation)

| Lot No. | Maximum Estimated VA/FHA Valuation | (1) Total Max. Loan (85% of Valuation) | (2) Amount of Loan Allocated to Land Note | (3) Amount of Loan Allocated to Construction Note |
|---|---|---|---|---|
| Each Lot | $17,000.00 | $14,450.00 | $1,845.00 | $12,605.00 |

MORTGAGE NOTE

$403,400.00 Louisville, Kentucky
August 2, 1961

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of FOUR HUNDRED THREE THOUSAND FOUR HUNDRED DOLLARS ($403,400.00), with interest from the date hereof on the unpaid principal advanced at the rate of six per centum (6%) per annum.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the

principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, hereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By _____

President

ATTEST:

_____

Secretary



MORTGAGE NOTE

$59,000.00 Louisville, Kentucky

August 2, 1961

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of FIFTY-NINE THOUSAND DOLLARS ($59,000.00), with interest at the rate of six per centum (6%) per annum, computed from the date of each advance, said interest being payable on the first day of each month beginning September 1, 1961.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By _____
President

ATTEST:

_____
Secretary

MORTGAGE NOTE

$2,950.00 Louisville, Kentucky
August 2, 1961

On or before December 31, 1962, for value received, the undersigned promises to pay to the order of U. S. STEEL HOMES CREDIT CORPORATION, a Delaware corporation, at its office in the City of New Albany, Indiana, or at such other place as the holder hereof may designate from time to time, in lawful money of the United States of America, the principal sum of TWO THOUSAND NINE HUNDRED FIFTY DOLLARS ($2,950.00), without interest. After maturity, interest shall be paid monthly on the first day of each month at the rate of six per centum (6%) per annum on all amounts which shall have been disbursed hereon and remain unpaid.

In certain events defined in the Mortgage hereinafter mentioned and in certain events defined in that certain



Loan Agreement of even date herewith between the undersigned and U. S. Steel Homes Credit Corporation, the principal of and interest on this Note may be declared and become due and payable before the stated maturity hereof by any legal holder hereof, in the manner and with the effect set forth in said Mortgage, whereupon the undersigned agrees to make payment of this Note accordingly.

In the event that any advances on account of the principal of this Note shall be made by payee subsequent to the occurrence of an event of default as defined in the said Mortgage or the said Loan Agreement, the making of such advances shall not be construed as a waiver of any such default, shall not in any manner alter, modify or amend any of the terms or provisions hereof and shall not affect or modify the obligation of the undersigned to make payment of the principal of and interest on this Note in accordance with its terms.

The maker and endorsers and all parties to this instrument severally waive presentment for payment, protest, notice of non-payment of this instrument, demand, and all legal diligence in enforcing collection.

This Note is secured by a Mortgage of even date herewith from the undersigned to U. S. Steel Homes Credit Corporation, secured by real estate situated in the County of Jefferson and State of Kentucky, to which Mortgage reference is made for a description of the security and rights of the holder of this Note in respect thereof.

FORTNER ENTERPRISES, INC.

By _____
President

ATTEST:

_____
Secretary

CERTIFICATE

U. S. Steel Homes Credit Corporation
Mutual Trust & Deposit Building
322 Pearl Street
New Albany, Indiana

The undersigned, as the duly elected, qualified and acting Secretary of Fortner Enterprises, Inc., a Kentucky corporation, hereby certifies as follows:

1. That at a meeting of the Board of Directors of said Company which was duly called and held on , 1961, and at which a quorum was present and voted, the following resolutions were unanimously adopted, to-wit:

RESOLVED, that this Company borrowed the sum of $465,350.00 from the U. S. Steel Homes Credit Corporation (hereinafter called the "Lender") and for the purpose of evidencing such loan and of providing for the security thereof, and the terms and provisions thereof, the officers of this Company and each of them be and they hereby are authorized to execute and deliver to the Lender, in form and substance satisfactory to said Lender and any one of such officers, whose approval thereof shall be conclusively evidenced by his signature thereto, the following documents and instruments, for and on behalf and in the name of this Company namely:

a. Promissory Notes, in the amount of $465,350.00, bearing interest at the rate of six per centum (6%) per annum, on the Land Note and Construction Note, and maturing December 31, 1962.

b. First mortgage on property of the Company described in Exhibit "A" attached hereto and made a part of this resolution.

c. Loan Agreement.

d. Any other contracts, agreements, assignments, chattel mortgages, stipulations or proper writings



necessary to accompany the aforesaid note and mortgage as may be requested by the Lender or required by law or regulations issued by the Federal Government pursuant thereto.

RESOLVED that each of such officers be and he hereby is authorized to make due acknowledgment of his execution and delivery of any or all of the foregoing instruments, as the act and deed of this Company; and

RESOLVED, that the Secretary of this Company be and he hereby is authorized and directed to prepare and certify copies of this and the foregoing resolutions and to deliver the same to the Lender, and that the Lender be and it hereby is authorized and empowered to rely upon this and the foregoing resolutions until and unless it receives written notice to the contrary signed by the President or Secretary of this Company.

2. That the said resolutions have not been amended, modified, repealed or rescinded, are in full force and effect, and have been duly recorded in the minute book of the said Company.

3. That the following are the duly elected, qualified and acting officers of the said Company, who are referred to in the foregoing resolutions and that opposite the name of each is his true and genuine signature, to-wit:

| Name | Title | Signature |
|---|---|---|
| A. B. Fortner, Jr. | President | _____ |
| Ruth L. Fortner | Vice President | _____ |
| Edna B. Herberman | Secretary | _____ |
| | Treasurer | _____ |
| | | _____ |
| | | _____ |

IN WITNESS WHEREOF, the undersigned has hereunto set his hand and the seal of said Company, this day of August, 1961.

_____

Secretary of
FORTNER ENTERPRISES, INC.

EXHIBIT "A"

(Attached to and made a part of a Resolution dated , 1961, by the Board of Directors of Fortner Enterprises, Inc.)

Situate in the County of Jefferson, State of Kentucky, and being more particularly described as follows, to-wit:

PARCEL 1

Lot Number 271 as shown and designated on the plat of Golden Meadows Section 2-A as it is recorded in Plat and Subdivision Book 13, Page 97, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 2

Lots Number 360 and 362 as shown and designated on the plat of Golden Meadows Section 2-B-1 as it is recorded in Plat and Subdivision Book 15, Page 14, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 3

Lots Number 298, 299, 300, 301, 302, 303, 305, 307, 318, 320, 321, 322, 326, 327, 329, 330, 331, 332, 333, 334, 337, 338, 346, 347, 350, 351, 352, 367, and 369 as shown and designated on the plat of Golden Meadows Section 2-B-2 as it is recorded in Plat and Subdivision Book 16, Page 41, in the office of the Clerk of the County Court of Jefferson County, Kentucky.



EXHIBT E

MORTGAGE DEED
Book 444, Page 86

THIS MORTGAGE, between FORTNER ENTERPRISES, INC., a Kentucky corporation having a principal place of business in the City of Louisville, County of Jefferson, and State of Kentucky, GRANTOR, and U. S. Steel Homes Credit Corporation, a Delaware corporation having a place of business in the City of New Albany, County of Floyd, and State of Indiana, GRANTEE:

WITNESSETH: Whereas GRANTOR desires to secure certain obligations to GRANTEE by mortgaging certain real estate;

NOW, THEREFORE, GRANTOR, for the purposes herein described, intending to be legally bound hereby, and in consideration of TEN and NO/100 DOLLARS ($10.00) received to its full satisfaction from GRANTEE, does hereby grant, bargain, sell, and convey to GRANTEE, its successors and assigns, the following described real estate, to-wit:

Situate in the County of Jefferson, State of Kentucky, and being more particularly described as follows, to-wit:

Book 444, Page 87

PARCEL 1

Lot Number 271 as shown and designated on the plat of Golden Meadows Section 2-A as it is recorded in Plat and Subdivision Book 13, Page 97, in the office of the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 2

Lots Number 360 and 362 as shown and designated on the plat of Golden Meadows Section 2-B-1 as it is recorded in Plat and Subdivision Book 15, Page 14, in the office of

the Clerk of the County Court of Jefferson County, Kentucky;

PARCEL 3

Lots Number 298, 299, 300, 301, 302, 303, 305, 307, 318, 320, 321, 322, 326, 327, 329, 330, 331, 332, 333, 334, 337, 338, 346, 347, 350, 351, 352, 367, and 369 as shown and designated on the plat of Golden Meadows Section 2-B-2 as it is recorded in Plat and Subdivision Book 16, Page 41, in the office of the Clerk of the County Court of Jefferson County, Kentucky.

TITLE to said property having been acquired by Mortgagor by two deeds, one dated July 6, 1961, of record in Deed Book 3700, page 323, and the other dated August 2, 1961, of record in Deed Book 3705, page 6 in the aforesaid Clerk's office.

This Mortgage is made for various purposes including erecting buildings on and improving the premises described in this instrument, all as prescribed by Item 1 of KRS 376.050.

Exhibit Mortgage, 1961

TO HAVE AND TO HOLD the said premises, with all appurtenances, to GRANTEE, its successors and assigns, with covenants of General Warranty, to secure:

FIRST: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of FIFTY-NINE THOUSAND DOLLARS ($59,000.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, said interest being payable on the first day of each month beginning September 1, 1961, it being expressly agreed in said note that said principal sum shall be due and payable on or before December 31, 1962, it being further expressly agreed therein that the whole of said principal sum then unpaid may be declared



and become due and payable in the event of default as therein defined;

SECOND: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of FOUR HUNDRED THREE THOUSAND FOUR HUNDRED DOLLARS ($403,400.00), with interest at the rate of six per centum (6%) per annum computed from the date of each advance, it being expressly agreed in said note that said principal sum together with said interest shall be due and payable on or before December 31, 1962, it being further expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

THIRD: Payment of a promissory note of even date herewith executed by GRANTOR in the sum of TWO THOUSAND NINE HUNDRED FIFTY DOLLARS ($2,950.00), without interest, it being expressly agreed in said note that said principal sum shall be due and payable on or before December 31, 1962, it being further expressly agreed therein that after maturity interest shall be due and payable monthly on the first day of each month at the rate of six per centum (6%) per annum on all amounts which shall have been disbursed thereon and remain unpaid, it being further expressly agreed therein that the whole of said principal sum then unpaid may be declared and become due and payable in the event of default as therein defined;

FOURTH: Payment by GRANTOR to GRANTEE of all sums expended or advanced by GRANTEE pursuant to this Mortgage or the Loan Agreement entered into between the parties of even date herewith;

FIFTH: Performance of each undertaking of GRANTOR contained herein, and performance of each undertaking of GRANTOR contained in and said Loan Agreement;

SIXTH: Payment by GRANTOR to GRANTEE of all other indebtedness, direct or contingent, now or hereafter owing by GRANTOR to GRANTEE.

FOR THE CONSIDERATION AFORESAID, GRANTOR covenants and agrees that:

FIRST: GRANTOR is lawfully seized in fee simple of said premises and has good right to sell and convey the same as aforesaid; said premises are free of all encumbrances, except liens for taxes and assessments not yet due and payable and any building and use restrictions of record; and GRANTOR will warrant and defend the title to the premises forever against the claims and demands of all persons whomsoever.

SECOND: GRANTOR shall keep all buildings and other insuranble property now or hereafter erected or placed in or on said mortgaged property insured against fire and other hazards, as undertaken in the aforementioned Loan Agreement.

Book 444, Page 88

THIRD: GRANTOR will maintain the mortgaged property free from any waste or nuisance, and will do all things necessary to maintain said property in good condition, and will pay when due all claims for labor performed and material furnished, and will not permit any lien of mechanics or materialmen to attach to the mortgaged property.

FOURTH: GRANTOR will pay, before they become delinquent, all taxes and assessments lawfully imposed upon the mortgaged property, and will promptly at the request of GRANTEE deliver to GRANTEE the receipt for such payment.

FIFTH: If GRANTOR fails to pay any taxes, assessments, liens, or insurance premiums when the same are due and payable, or otherwise defaults in the performance



of any other covenant hereunder or under the said Loan Agreement, the security hereby created shall then become enforceable. GRANTEE may thereupon pay any such sums and perform any such covenants in respect of which there has been a default, and GRANTOR agrees promptly to repay any sums so advanced, without demand, with interest at the rate of six per centum (6%) per annum from the date of such advances, and such sums so advanced, with such interest, shall be secured hereby, but no such advance shall relieve GRANTOR of the consequences of any such default.

SIXTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may declare all sums secured hereby immediately due and payable, and GRANTOR shall then pay said sums forthwith.

SEVENTH: Should the security hereby created become enforceable as hereinabove provided, GRANTEE may take possession of the mortgaged property, manage it and collect rents therefrom and apply same, less reasonable collection costs, upon the indebtedness hereby secured, and all leases and rents of the mortgaged property, after the security shall become enforceable, are hereby assigned and mortgaged to GRANTEE as additional security for the indebtedness secured hereby.

EIGHTH: GRANTOR will not claim the benefit of any stay, extension, appraisement, or redemption law now or at any time hereafter in effect.

PROVIDED, ALWAYS, that if GRANTOR pays to GRANTEE the principal and interest on said notes, when and as the same shall become due and payable, and pays any and all other sums payable under said notes or under this Mortgage or secured by this Mortgage, this conveyance shall thereupon become null and void, and in such case GRANTEE shall execute and deliver to GRANTOR, at

GRANTOR's cost, an appropriate release and discharge of this Mortgage in form to be recorded.

IN WITNESS WHEREOF, GRANTOR in pursuance of a resolution adopted by its Board of Directors on the 20th day of July, 1961, has hereunto caused its corporate name to be affixed and these presents to be subscribed by its A. B. Forner, Jr., President and Edna B. Herberman, Secretary this 2nd day of August, 1961.

FORTNER ENTERPRISES, INC.

/s/ A. B. Fortner, Jr.

By _____

President

/s/ Edna B. Herberman

And _____

Secretary

(Seal)

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS.

I, a Notary Public in and for the County and State aforesaid do certify that on this day the foregoing Mortgage from Fortner Enterprises, Inc. to U. S. Steel Homes Credit Corporation was produced before me and acknowledged and delivered before me by A. B. Fortner, Jr. as President of Fortner Enterprises, Inc., a corporation, party thereto, to be the act and deed of said corporation by him as its President, thereunto duly authorized and the seal of said corporation as affixed to said deed was attested and proven before me by Edna B. Herberman, as its Secretary.

Given under my hand and seal of office this 2nd day of August, 1961.

/s/ Henry B. Mann

Notary Public, Jefferson County, Kentucky

(Seal)



**ANSWER TO AMENDED COMPLAINT**—Filed May 23, 1966.

The defendants and each of them, for answer to the amended complaint.

First Defense

1. Repeat and adopt by reference their earlier answer to the original complaint.

2. Deny the allegations found in Paragraph 3 of the amended complaint, except that they admit the execution and existence of the loan agreement referred to in Paragraph 2 of the amended complaint and filed therewith as Exhibit "D".

3. Deny Paragraph 3 of the amended complaint, except that they admit the loan agreement of August 2, 1961 contemplated that plaintiff would construct approximately 32 single family dwellings utilizing components produced and furnished by United States Steel Homes Division, United States Steel Corporation.

4. Deny the allegations found in Paragraph 4 of the amended complaint, except that they admit there has been a foreclosure action affecting the property, which was the subject matter of the loan agreements here involved.

5. Deny the allegations found in Paragraph 5 of the amended complaint.

6. Deny the allegations found in Paragraph 6 of the amended complaint, except that they admit the defendant U. S. Steel Homes Credit Corporation is claiming as of May 12, 1965 that the plaintiff owed it at least the sum of $88,733.60.

Second Defense

1. As to Paragraphs 2, 3, 4, 5 and 6 of the amended complaint, the defendants and each of them affirmatively plead in bar to the further prosecution of the claims made therein, the statute of limitations made and provided therefor, (15 U.S.C. 15b).

*Amended Complaint*

Third Defense

1. As to Paragraph 4, subparagraph G of Paragraph 5 and Paragraph 6 of the amended complaint, grounded on the illegality of the foreclosure action, the defendants and each of them plead that the point in issue giving rise to the allegations and claims for damage related thereto, has heretofore been decided in Action Number 4392-A, United States District Court for the Western District of Kentucky, at Louisville, styled Fortner Enterprises, Inc., Plaintiff v. United States Steel Homes Credit Corporation, Defendant, adversely to the renewed claims related thereto now made in the amended complaint, by a judgment entered in said Action Number 4392-A, January 15, 1964.

2. The judgment referred to in the immediately preceding paragraph is in full force and effect and is now final and binding on the parties hereto.

WHEREFORE, the defendants and each of them, pray that the complaint and amended complaint against them be dismissed, for their costs and all other relief.

Albert F. Reutlinger



**PLAINTIFF'S TENDERED INSTRUCTIONS**—Filed June 30, 1966.

1. The evidence presented in this case has established as a matter of law that the defendants, U. S. Steel Corporation and U. S. Steel Homes Credit Corporation, conspired to establish an unlawful tying agreement between the defendant Credit Corporation and the plaintiff Fortner Enterprises, Inc. which required the plaintiff to purchase and build homes manufactured and sold by U. S. Steel Corporation in plaintiff's subdivision in violation of Sections 1 and 2 of the Sherman Act.

2. If you believe from the evidence that the unlawful tying agreement imposed upon the plaintiff by the defendants caused the plaintiff to lose profits on the sale of homes actually sold by the plaintiff in the subdivision and caused the plaintiff to lose profits by its inability to sell the remainder of the homes in the subdivision, then the law is for the plaintiff and you will award it such a sum and damages as will fairly and reasonably compensate it for the loss of profits as aforesaid, not to exceed on this account the sum of $197,100.00 the amount claimed.

3. If you further believe from the evidence that the unlawful conduct of the defendants caused the property of the plaintiff to be sold for a sum less than the fair and reasonable market value at the time of said sale, then you will also award the plaintiff as damages the difference in the sum for which said property was sold and its fair and reasonable market value at the time of said sale, not to exceed on this account the sum of $52,737.31, the amount claimed.

4. If you find for the plaintiff, your whole award shall not exceed the sum of $249,837.31, the amount claimed.

Tendered by:
Kenneth L. Anderson
A. Scott Hamilton, Jr.

**SUPREME COURT OPINION**—Filed May 5, 1969.

[394 US 495]

FORTNER ENTERPRISES, INC., Petitioner,

v.

UNITED STATES STEEL CORP., et al.

394 US 495, 22 L Ed 2d 495, 89 S Ct 1252

[No. 306]

Argued January 23, 1969. Decided April 7, 1969.

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SUMMARY

A private action for treble damages and an injunction for violations of the Sherman Act was instituted in a United States District Court, the plaintiff alleging an illegal tying arrangement between the defendant steel corporation and its wholly owned credit corporation whereby, as a condition of obtaining loans from the credit corporation for the purchase and development of certain land, the plaintiff was required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporation for erection on each of the lots purchased with the loan proceeds. The District Court entered summary judgment for the defendants, holding that the plaintiff's allegations failed to raise any question of fact as to a possible violation of the antitrust laws, and that the plaintiff had failed to establish the prerequisites of illegality of a tying arrangement (293 F Supp 762). The Court of Appeals for the Sixth Circuit affirmed without opinion (404 F 2d 936).

On certiorari, the Supreme Court of the United States reversed and remanded. In an opinion by Black, J., expressing he view of five members of the court, it was held that (1) the challenged conduct of the defendants primarily involved a tying arrangement of the traditional kind—



the purchaser being required to take a tied product (prefabricated homes) as a condition of being allowed to purchase the tying product (credit), (2) tying arrangements were unreasonable per se whenever the defendant had sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce was affected, (3) the pleadings and affidavits in the case at bar were sufficient ot preclude summary judgment against the plaintiff, a fact question as to the market power standard of the per se doctrine having been raised by statements that prefabricated homes of competitors were priced at least $400 less than the defendant steel corporation's homes, and by statements that only the defendant credit corporation furnished 100 percent financing at low rates—it thus being impossible to conclude as a matter of law that the tying arrangement served legitimate business purposes and that the defendant credit corporation did not have a competitive advantage in the credit market, and (4) credit was not to be distinguished from other kinds of goods and services when used as the tying product of a tying arrangement.

White, J., joined by Harlan, J., dissented, expressing the view that (1) the majority's opinion did away in practice with the requirement, under the doctrine of per se unreasonableness of tying arrangements, of the showing of market power in the tying product since there was no showing that the defendants had any market power in the credit market itself, and (2) credit financing by sellers who have no independently demonstrable power in the credit market should not be proscribed as per se unreasonable.

Fortas, J., joined by Stewart, J., dissented, stating that (1) he subscribed in general to the dissenting opinion of

White, J., (2) the defendants' arrangement was not a tying agreement, but was merely the sale of a single product with incidental provisions for financing, most of the financing being related to the purchase and installation of houses, and the defendants not selling credit in any general sense, (3) while combinations of sales and credit might be considered illegal on specific showing of market power and anticompetitive effect, or on showings of unfair competition or price discrimination, nevertheless, such combinations should not be included in the per se ban of tying arrangements, and (4) the majority's decision might operate destructively as to the extension of credit and ancillary services as part of general sales transactions or distribution methods, which were common in the economy.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur, Monopolies, Combinations, and Restraints of Trade (1st ed §§ 16, 24, 25)

14 Am Jur Pl & Pr Forms, Monopolies, Combinations, and Restraints of Trade, Forms 14:311, 14:319

US L Ed Digest, Restraints of Trade and Monopolies §§ 30, 32

ALR Digests, Restraints of Trade and Monopolies §§ 16.5, 30, 31

L Ed Index to Anno, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies

ANNOTATION REFERENCES

Extent of trade's right to exercise his own discretion as to the persons with whom he will or will not deal. 68 L Ed 448.

Actions for threefold damages under Federal Antitrust Act, 53 L Ed 826.



FORTNER ENTERPRISES v. U. S. STEEL CORP.
394 US 495, 22 L Ed 2d 495, 89 S Ct 1252

HEADNOTES

Classified to U. S. Supreme Court Digest, Annotated

Pleading § 48.5; Restraints of Trade and Monopolies § 30—summary judgment—restraint of trade—tying arrangement

1. In an action for treble damages and an injunction against alleged violations of §§ 1 and 2 of the Sherman Act (15 USC §§ 1, 2) by an alleged tying arrangement between the defendant steel corporation and its wholly owned credit corporation whereby, as a condition of obtaining loans from the credit corporation for the purchase and development of certain land, the plaintiff was required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporation for erection on each of the lots purchased with the loan proceeds, summary judgment is improperly entered against the plaintiff, since fact questions are raised which, if provided at trial would bring the arrangement within the scope of the doctrine of per se illegality of tying arrangements—which doctrine is applicable if there is sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and if a substantial volume of commerce in the tied product is foreclosed—where (1) the complaint and affidavits established that the volume of commerce allegedly foreclosed was substantial, the plaintiff's annual purchases of prefabricated houses being $190,000, which was not insubstantial in itself, and in any event, the more relevant figures indicating that the annual sales throughout the country to all purchasers allegedly foreclosed by the defendants' tying arrangements for a 3-year period ranged from $2,300,000 to $4,000,000,

and (2) the possibility of market power over borrowers in the credit market was sufficiently established by the pleadings and affidavits to entitle the plaintiff to go to trial on such issue, some special power of the defendants in the credit market being inferable from statements that the prefabricated homes of competitors were priced at least $400 less than the defendant steel corporation's homes, and from statements that only the defendant credit corporation furnished 100 percent financing at low rates, which claim of uniqueness, although not sufficient alone to establish market power, is to be interpreted most favorably to the plaintiff and could reflect the defendants' unique economic advantages over competitors, and it being impossible to conclude as a matter of law that the tying arrangement served legitimate business purposes and that the defendant credit corporation did not have a competitive advantage in the credit market.

Restraints of Trade and Monopolies § 30—tying arrangement—loan conditioned on purchase of product

2. In an action for treble damages and an injunction against alleged violations of §§ 1 and 2 of the Sherman Act (15 USC §§ 1, 2) by an alleged arrangement between the defendant steel corporation and its wholly owned credit corporation whereby, as a condition of obtaining loans from the credit corporation for the purchase and development of land, persons, including the plaintiff, were required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporation for erection on each of the lots purchased with the loan proceeds, the challenged conduct primarily involves a tying arrangement of the traditional kind—the purchaser being required to take a tied product (prefabricated homes) as a condition of being allowed to purchase the tying product (credit).



Restraints of Trade and Monopolies § 30—tying arrangements—unreasonable competitive effect

3. At least when certain prerequisites are met, tying arrangements—whereby a purchaser is required to take a tied product as a condition of being allowed to purchase the tying product—are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required.

Evidence § 343.5—presumption—restraint of trade

4. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal restraints of trade without elaborate inquiry to the precise harm that they have caused or the business excuse for their use.

Restraints of Trade and Monopolies § 30—tying arrangements

5. Where there has been successful exaction of the conditions of a tying arrangement (that is an agreement by one party to sell one product but only on the condition that the buyer also purchase a different or tied product, or at least agree that he will not purchase that product from any other supplier) competition on the merits with respect to the tied product is inevitably curbed.

Restraints of Trade and Monopolies § 30—tying arrangements

6. Tying agreements serve hardly any purpose beyond the suppression of competition, denying competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of its power or leverage in another market, and at the same time forcing buyers to forgo their free choice between competing products.

Restraints of Trade and Monopolies § 30—tying arrangements

7. Tying agreements fare harshly under the laws forbidding restraints of trade, being unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected.

Pleading § 48.5; Restraints of Trade and Monopolies § 30—tying arrangements—summary judgment

8. Under the principle that tying arrangements are unreasonable in and of themselves whenever (1) a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a not insubstantial amount of interstate commerce is affected, the standards are necessary only to bring into play the doctrine of per se illegality, and a plaintiff's inability to satisfy such standards is not fatal to his case, so as to warrant summary judgment against him, since the plaintiff can still prevail on the merits whenever he can prove, on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated.

Pleading § 48.5; Restraints of Trade and Monopolies § 30—summary judgment—restraint of trade—tying arrangement

9. Even if the standards necessary for application of the doctrine of per se illegality of tying arrangements—sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and the affecting of a not insubstantial amount of interstate commerce—are considered as not being satisfied in a private action for alleged violation §§ 1 and 2 of the Sherman Act (15 USC §§ 1, 2) by an alleged arrangement between the defendant steel corporation and its wholly owned credit corporation whereby, in order to obtain loans from the credit corporation for the purchase and development of certain land, the plaintiff was required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporation for erection on each of the lots purchased with the loan proceeds, nevertheless, summary judgment canont be entered against the plaintiff without further examination of the general allegations that the defendants conspired together for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses.



Restraints of Trade and Monopolies § 63—summary procedures

10. Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Restraints of Trade and Monopolies § 30—tying arrangements—scope of market

11. Under the principle that tying arrangements are unreasonable in and of themselves whenever (1) a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a not insubstantial amount of interstate commerce is affected, the requirement that a not insubstantial amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie; normally, the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimus, is foreclosed to competitors by the tie.

Restraints of Trade and Monopolies § 30—tying arrangement

12. It is unreasonable, per se, to foreclose competitors from any substantial market by a tying arrangement.

Restraints of Trade and Monopolies §§ 63, 67—private litigation—public interest

13. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition.

Restraints of Trade and Monopolies § 30—tying arrangement—commerce foreclosed

14. Under the principle that tying arrangements are unreasonable in and of themselves whenever (1) a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a not insubstantial amount of interstate commerce is affected, the relevant figure—for purposes of determining in a private antitrust action whether the amount of commerce foreclosed is to insubstantial to warrant prohibition of the practice—is the total volume of sales tied by the sales policy under challenge, not the portion or such total accounted for by the particular plaintiff who brings suit.

Evidence § 343.5; Restraints of Trade and Monopolies § 30—tying arrangements—economic power

15. Under the principle that tying arrangements are unreasonable in and of themselves whenever (1) a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product, and (2) a not insubstantial amount of interstate commerce is affected, the standard of



sufficient economic power does not require that the defendant have a monopoly or even a dominant position throughout the market for the tying product; the economic power over the tying product can be sufficient even though the power falls short of dominance and even though the power exists only with respect to some of the buyers in the market; even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

Restraints of Trade and Monopolies § 30—tying arrangements—economic power

16. Because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie; such appreciable restraints result whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market; the proper focus of concern is whether the seller has the power to raise price, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Restraints of Trade and Monopolies §§ 30, 55, 62—tying arrangements—economic power

17. With regard to the requirement under the doctrine of per se illegality of tying arrangements that the defendant have sufficient power with respect to the tying product to appreciably restrain free competition in the market for the tied product, uniqueness with regard to the tying product confers economic power only when other competitors are in some way prevented from offering the distinctive

product themselves; such barriers may be legal, as in the case of patented and copyrighted products, or physical, as when the product is land; while the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, nevertheless, the uniqueness test in such situations is confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it.

Pleading § 48.5—summary judgment—antitrust case

18. Summary judgment in antitrust cases is disfavored.

Appeal and Error § 1477—restraint of trade—summary judgment

19. Upon review of the entry of a summary judgment for the defendants in a private civil action for alleged violations of the Sherman Act (15 USC §§ 1, 2), it is not the function of the Supreme Court of the United States to speculate as to the ultimate findings of fact.

Restraints of Trade and Monopolies § 32—tying arrangement—credit

20. In a private action for alleged violation of §§ 1 and 2 of the Sherman Act (15 USC §§ 1, 2) by an alleged tying arrangement between the defendant steel corporation and its wholly owned credit corporation whereby, as a condition of obtaining loans from the credit corporation for the purchase and development of certain land, the plaintiff was required to agree to purchase at unreasonably high prices prefabricated houses manufactured by the steel corporation for erection on each of the lots purchased with the loan proceeds, there is no merit in the defendants' contention that because the arrangement involved credit and was simply a form of price competition equivalent to offering a comparable reduction in the cash price of the tied product, it should not be subject to normal tie-in principles, since, regardless of what might be the situation involved in the usual sale on credit by the manufacturer of goods, under the arrangement between the defendants the credit was provided by one corporation on condition that a product be purchased from a separate corporation, and the borrower contracted to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased, the arrangement thus involving two separate products rather than only a single product.



Restraints of Trade and Monopolies § 30—tying arrangements—separate products

21. At the outset of every case involving an alleged illegal tying arrangement under which the purchaser is required to take a tied product as a condition of being allowed to purchase the tying product, there is the problem of determining whether two separate products are in fact involved.

Restraints of Trade and Monopolies § 32—tying arrangement—credit

22. Credit is not to be distinguished from other kinds of goods and services when used as a tying product under an arrangement whereby the purchaser is required to take a tied product as a condition of being allowed to purchase the tying product, the potential harm that the seller can use his power over the tying product to win customers that would otherwise have constituted a market available to competing producers of the tied product being essentially the same when the tying product is credit, and it not being proper that economies in financing, any more than economies in other lines of business, be used to exert economic power over other products thatt he company produces no more efficiently than its competitors; the same inquiries must be made as to economic power over the tying product

and substantial effect in the tied market, and where such factors are present, no special treatment can be justified solely because credit, rather than some other product, is the source of the tying leverage sued to restrain competition.

## APPEARANCES OF COUNSEL

Kenneth L. Anderson argued the cause for petitioner.

Macdonald Flinn argued the cause for respondents.

Briefs of Counsel, p. 941, infra.

## OPINION OF THE COURT

[394 US 496]

Mr. Justice Black delivered the opinion of the Court.

This case raises a variety of questions concerning the proper standards to be applied by a United States district court in passing on a motion for summary judgment in a civil antitrust action. Petitioner, Fortner Enterprises, Inc., filed this suit seeking treble damages and an injunction against alleged violations of §§ 1 and 2 of the Sherman Act, 26 Stat 209, as amended, 15 USC §§ 1, 2. The complaint charged that respondents, United States Steel Corp. and its wholly owned subsidiary, the United States Steel Homes Credit

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Corp., had engaged in a contract, combination, and conspiracy to restrain trade and to monopolize trade in the sale of prefabricated houses. It alleged that there was a continuing agreement between respondents "to force corporations and individuals, including the plaintiff, as a condition to availing themselves of the services of United States Steel Homes Credit Corporation, to purchase at artificially high prices only United States Steel Homes . . ." Specifically, petitioner claimed that in order to obtain loans totaling over $2,000,000 from the Credit Corp. for the purchase and development of certain land in the Louisville, Kentucky, area, it had been required to agree, as a condition of the loans, to erect a prefabricated house manufactured by U. S. Steel on each of the lots purchased with the loan proceeds. Petitioner claimed that the prefabricated materials were then supplied by U. S. Steel at unreasonably high prices and proved to be defective and unusable, thus requiring the expenditure of additional sums and delaying the completion date for the development. Petitioner sought treble damages for the profits thus lost, along with a decree enjoining respondents from enforcing the requirement of the loan agreement that petitioner use only houses manufactured by U. S. Steel.



[1] After pretrial proceedings in which a number of affidavits and answers to interrogatories were filed, the District Court entered summary judgment for respondents, holding that petitioner's allegations had failed to raise any question of fact as to a possible violation of the antitrust laws. Noting that the agreement involved here was essentially a tying arrangement, under which the purchaser was required to take a tied product—here prefabricated homes—as a condition of being allowed to purchase the tying product—here credit, the District Judge held that petitioner had failed to establish the prerequisites of illegality under our tying cases, namely

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sufficient market power over the tying product and foreclosure of a substantial volume of commerce in the tied product. The Court of Appeals affirmed without opinion, and we granted certiorari, 393 US 820, 21 L Ed 2d 92, 89 S Ct. 126 (1968). Since we find no basis for sustaining this summary judgment, we reverse and order that the case proceed to trial.

[2-7] We agree with the District Court that the conduct challenged here primarily involves a tying arrangement of the traditional kind. The Credit Corp. sold its credit only on the condition that petitioner purchase a certain number of prefabricated houses from the Homes Division of U. S. Steel. Our cases have made clear that, at least when certain prerequisites are met, arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required. The discussion in Northern Pacific R. Co. v. United States, 356 US 1, 5-6, 2 L Ed 2d 545, 549, 550, 78 S Ct 514 (1958), is dispositive of this question:

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any rendeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. . . .

". . . Where [tying]) conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California v. United States, 337 US 293, 305-306, [93 L Ed 1371, 1382, 69 S Ct 1051]. They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage

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in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 US 594, 606, [97 L Ed 1277, 1288, 73 S Ct 872]. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. International Salt Co. v. United States, 332 US 392, [92 L Ed 20, 68 S Ct 12]." (Footnote omitted.)



Despite its recognition of this strict standard, the District Court held that petitioner had not even made out a case for the jury. The court held that respondents did not have "sufficient economic power" over credit, the tying product here, because although the Credit Corp.'s terms evidently made the loans uniquely attractive to petitioner, petitioner had not proved that the Credit Corp. enjoyed the same unique attractiveness or economic control with respect to buyers generally. The court also held that the amount of interstate commerce affected was "insubstantial" because only a very small percentage of the land available for development in the area was foreclosed to competing sellers of prefabricated houses by the contract with petitioner. We think it plain that the District Court misunderstood the two controlling standards and misconceived the extent of its authority to evaluate the evidence in ruling on this motion for summary judgment.

[8-10] A preliminary error that should not pass unnoticed is the District Court's assumption that the two prerequisites mentioned in Northern Pacific are standards that petitonier must meet in order to prevail on the merits. On the contrary, these standards are necessary only to bring

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into play the doctrine of per se illegality. Where the standards were found satisfied in Northern Pacific, and in International Salt Co. v. United States, 332 U. S. 392, 92 L Ed 20, 68 S Ct 12 (1947), this Court approved summary judgment

against the defendants but by no means implied that inability to satisfy these standards would be fatal to a plaintiff's case. A plaintiff can still prevail on the merits whenever he can prove on the basis of a more thorough examination of the purposes and effects of the practices involved, that the general standards of the Sherman Act have been violated. Accordingly, even if we could agree with the District Court that the Northern Pacific standards were not satisfied here, the summary judgment against petitioner still could not be entered without further examination of petitioner's general allegations that respondents conspired together for the purpose of restraining competition and acquiring a monopoly in the market for prefabricated houses. And such an examination could rarely justify summary judgment with respect to a claim of this kind, for as we said in Poller v. Columbia Broadcasting, 368 US 464, 473, 7 L Ed 2d 458, 464, 82 S Ct 486 (1962): "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." (Footnote omitted.)

[1, 11, 12] We need not consider, however, whether petitioner is entitled to a trial on this more general theory, for it is clear that petitioner raised questions of fact which, if

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proved at trial, would bring this tying arrangement within the scope of the per se doctrine. The requirement that a "not insubstantial" amount of commerce be involved makes



no reference to the scope of any particular market or to the share of that market foreclosed by the tie, and hence we could not approve of the trial judge's conclusions on this issue even if we agreed that his definition of the relevant market was the proper one.[1] An analysis of market shares might become relevant if it was alleged that an apparently small dollar-volume of business actually represented a substantial part of the sales for which competitors were bidding. But normally the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie, or as we said in International Salt, it is "unreasonable, per se, to foreclose competitors from any substantial market" by a tying arrangement, 332 US, at 396, 92 L Ed at 26.

[13, 14] The complaint and affidavits filed here leave no room for doubt that the volume of commerce allegedly foreclosed was substantial. It may be true, as respondents claim, that petitioner's annual purchases of houses from U. S. Steel under the tying arrangement never exceeded

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$190,000, while more than $500,000 in annual sales was involved in the tying arrangement held illegal in International Salt, but we cannot agree with respondents that a sum of almost $200,000 is paltry or "insubstantial." In any event, a narrow focus on the volume of commerce foreclosed

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[1]Since the loan agreements obligated petitioner to erect houses manufactured by U. S. Steel on the land acquired, the trial judge thought the relevant foreclosure was the percentage of the undeveloped land in the county that was no longer open for sites on which homes made by competing producers could be built. This apparently was an insignificant .00082%. But of course the availability of numerous vacant lots on which houses might legally be erected would be small consolation to competing producers once the economic demand for houses had been preempted by respondents. It seems plain that the most significant percentage figure with reference to the tied product is the percentage of annual sales of houses, or prefabricated houses, in the area that was foreclosed to other competitors by the tying arrangement.

by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. See Perma Life Mufflers v. International Parts Corp., 392 US 134, 138-139, 20 L Ed 2d 982, 990, 88 S Ct 1981 (1968). For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. In International Salt the $500,000 total represented the volume of tied sales to all purchasers, and although this amount was directly involved because the case was brought by the Government against the practice generally, the case would have been no less worthy of judicial scrutiny if it had been brought by one individual purchaser who accounted for only a fraction of the $500,000 in tied sales. In the present case, the annual sales allegedly foreclosed by respondents' tying arrangements throughout the country totalled almost $4,000,000 in 1960, more than $2,800,000 in 1961, and almost $2,300,000 in 1962. These amounts could scarcely be regarded as insubstantial.

[15] The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over

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the tying product can be sufficient even though the power falls far short of dominance and even though the power



exists only with respect to some of the buyers in the market. See, e. g., International Salt; Northern Pacific; United States v. Loew's Inc., 371 US 38, 9 L Ed 2d 11, 83 S Ct 97 (1962). As we said in the Loew's case, 371 US, at 45, 9 L Ed 2d at 18: "Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes."

[16] These decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie. Such appreciable restraint results whenever the seller can exert some power over some of the buyers in the market, even if his power is not complete over them and over all other buyers in the market. In fact, complete dominance throughout the market, the concept that the District Court apparently had in mind, would never exist even under a pure monopoly. Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the lmost inevitable result of higher prices. Even a complete monopolist can seldom raise his price without losing some sales; many buyers will cease to buy the product, or buy less, as the price rises. Market power is therefore a source of serious concern for essentially the same reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power, In both instances, despite the freedom of some or many buyers from the seller's power, other buyers—whether few or many, whether scat-

tered throughout the market or part of some group within the market—

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can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

[1] The affidavits put forward by petitioner clearly entitle it to its day in court under this standard. A construction company president stated that competitors of U. S. Steel sold prefabricated houses and built conventional homse for at least $400 less than U. S. Steel's price for comparable models. Since in a freely competitive situation buyers would not accept a tying arrangement obligating them to buy a tied product at a price higher than the going market rate, this substantial price differential with respect to the tied product (prefabricated houses) in itself may suggest that respondents had some special economic power in the credit market. In addition, petitioner's president, A. B. Fortner, stated that he accepted the tying condition on respondents' loan solely because the offer to provide 100% financing, lending an amount equal to the full purchase price of the land to be acquired, was unusually and uniquely advantageous to him. He found that no such financing was available to his corporation on any such cheap terms from any other source during the 1959-1962 period. His views on this were supported by the president of a finance company in the Louisville area, who stated in an affidavit that the type of



advantageous financing plan offered by U. S. Steel "was not available to Fortner Enterprises or any other potential borrower from or through Louisville Mortgage Service Company or from

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or through any other lending institution or mortgage company to this affiant's knowledge during this period."

[17, 18] We do not mean to accept petitioner's apparent argument that market power can be inferred simply because the kind of financing terms offered by a lending company are "unique and unusual." We do mean, however, that uniquely and unusually advantageous terms can reflect a creditor's unique economic advantages over his competitors.[2] Since summary judgment in antitrust cases is disfavored, Poller, supra, the claims of uniqueness in this case should be read in the light most favorable to petitioner. They could well mean that U. S. Steel's subsidiary Credit Corp. had a unique economic ability to provide 100% financing at cheap rates. The affidavits show that for a three-to-four-year period no other financial institution in the Louisville area was willing to match the special credit terms and rates of interest available from U. S. Steel. Since the possibility of a decline in property values, along with the difficulty of recovering full market value in a foreclosure sale, makes it desirable for a creditor to obtain collateral greater in value than the loan it secures, the unwillingness of competing financial institutions in the area to offer 100% financing probably reflects their feeling

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[17] [2]Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products, e. g., International Salt; Loew's, or physical, as when the product is land, e. g., Northern Pacific. It is true that the barriers may also be economic, as when competitors are simply unable to produce the distinctive product profitably, but the uniqueness test in such situations is somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it.

that they could not profitably lend money on the risks involved. U. S. Steel's subsidiary Credit Corp., on the other hand, may

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well have had a substantial competitive advantage in providing this type of financing because of economies resulting from the nationwide character of its operations. In addition, potential competitors such as banks and savings and loan associations may have been prohibited from offering 100% financing by state or federal law.[3] Under these circumstances the pleadings and affidavits sufficiently disclose the possibility of market power over borrowers in the credit market to entitle petitioner to go to trial on this issue.

[19] It may also be, of course, that these allegations will not be sustained when the case goes to trial. It may turn out that the arrangement involved here serves legitimate business purposes and that U. S. Steel's subsidiary does not have a competitive advantage in the credit market. But on the record before us it would be impossible to reach such conclusions as a matter of law, and it is not our function to speculate as to the ultimate findings of fact. We therefore conclude that the showing made by petitioner was sufficient on the market power issue.

[20] Brief consideration should also be given to respondents' additional argument that even if their unique kind of financing reflected economic power in the credit market, and even if a substantial volume of commerce was affected, the arrangement involving credit should not be held illegal under normal tie-in principles. In support of this, respondents suggest that every sale on credit in effect involves a tie. They argue that the offering of favorable

[3]See, e. g., Federal Reserve Act § 24, 38 Stat. 273, as amended, 12 USC § 371; 12 CFR § 545.6-14(c).



credit terms is simply a form of price competition equivalent to the offering of a comparable reduction in the cash price of the tied product. Consumers should not, they say, be deprived of such

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advantageous services, and they suffer no harm because they can buy the tangible product with credit obtained elsewhere if the combined price of the seller's credit-product package is less favorable than the cost of purchasing the components separately.

[21] All of respondents' arguments amount essentially to the same claim—namely, that this opinion will somehow prevent those who manufacture goods from ever selling them on credit. But our holding in this case will have no such effect. There is, at the outset of every tie-in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. It will be time enough to pass on the issue of credit sales when a case involving it actually arises. Sales such as that are a far cry from the arrangement involved here, where the credit is provided by one corporation on condition that a product be purchased from a separate corporation,[4] and where the borrower contracts to obtain a large sum of money over and above that needed to pay the seller for the physical products purchased.

[4]Cf. Perma Life Mufflers, 392 US, at 141-142, 20 L Ed 2d at 991, 992; Timken Co. v. United States, 341 US 593, 598, 95 L Ed 1199, 1206, 71 S Ct 971 (1951); Kiefer-Stewart Co. v. Seagram & Sons, 340 US 211, 215, 95 L Ed 219, 224, 71 S Ct 487 (1951); United States v. Yellow Cab Co., 332 US 218, 227, 91 L Ed 2010, 2018, 67 S Ct. 1560 (1947).

Whatever the standards for determining exactly when a transaction involves only a "single product," we cannot see how an arrangement such as that present in this case could ever be said to involve only a single product.

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[22] Nor does anything in respondents' arguments serve to distinguish credit from other kinds of goods and services, all of which may, when used as tying products, extend the seller's economic power to new markets and foreclose competition in the tied product. The asserted business justifications for a tie of credit are not essentially different from the justifications that can be advanced when the tying product is some other service or commodity. Although advantageous credit terms may be viewed as a form of price competition in the tried product, so is the offer of any other tying product on advantageous terms. In both instances, the seller can achieve his alleged purpose, without extending his economic power, by simply reducing the price of the tried product itself.[5]

The potential harm is also essentially the same when the tying product is credit. The buyer may have the choice of buying the tangible commodity separately, but as in other cases the seller can use his power over the tying product to win customers that would otherwise have constituted a market available to competing producers of the tied product. "[C]ompetition on the merits with respect to the tied product is inevitably curbed." Northern Pacific, 356 US, at 6, 2 L Ed 2d at 550. Nor can it be assumed that because the product involved is money needed to finance a purchase, the buyer would not have been able to purchase from anyone else without the seller's attractive

[5]Where price reductions on the tied product are made difficult in practice by the structure of that market, the seller can still achieve his alleged objective by offering other kinds of fringe benefits over which he has no economic power.



credit. A buyer might have a strong preference for a seller's credit because it would eliminate the need for him to lay out personal funds, borrow from relatives, put up additional collateral, or obtain guarantors,

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but any of these expedients might have been chosen to finance a purchase from a competing producer if the seller had not captured the sale by means of his tying arrangement.

In addition, barriers to entry in the market for the tied product are raised since, in order to sell to certain buyers, a new company not only must be able to manufacture the tied product but also must have sufficient financial strength to offer credit comparable to that provided by larger competitors under tying arrangements. If the larger companies have achieved economies of scale in their credit operations, they can of course exploit these economies legitimately by lowering their credit charges to consumers who purchase credit only, but economies in financing should not, any more than economies in other lines of business, be used to exert economic power over other products that the company produces no more efficiently than its competitors.

For all these reasons we can find no basis for treating credit differently in principle from other goods and services. Although money is a fungible commodity—like wheat or, for that matter, unfinished steel—credit markets, like other markets, are often imperfect, and it is easy to see how a big company with vast sums of money in its treasury could wield very substantial power in a credit market. Where this is true, tie-ins involving credit can cause all the evils that the antitrust laws have always been intended to prevent, crippling other companies that are equally, if not more, efficient in producing their own products. There-

fore, the same inquiries must be made as to economic power over the tying product and substantial effect in the tied market, but where these factors are present no special treatment can be justified solely because credit, rather than some other product, is the source of the tying leverage used to restrain competition.

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The judgment of the Court of Appeals is reversed, and the case is remanded with directions to let this suit proceed to trial.

Reversed and remanded.

## SEPARATE OPINIONS

Mr. Justice White, with whom Mr. Justice Harlan joins, dissenting.

The judicially developed proscription of certain kinds of tying arrangements has been commonly understood to be this: an antitrust defendant who ties the availability of one product to the purchase of another violates § 1 of the Sherman Act if he both has sufficient market power in the tying product and affects a substantial quantity of commerce in the tied product. This case further defines the degree of market power which is sufficient to invoke the tying rule. Prior cases provide some guidance but are not dispositive. Admittedly, monopoly power or dominance in the tying market, Times-Picayune Publishing Co. v. United States, 345 US 594, 608-611, 97 L Ed 1277, 1290, 1291, 73 S Ct 872 (1953), is not necessary; it is enough if there is "sufficient economic power to impose an appreciable restraint on free competition in the tied product," Northern Pacific R. Co. v. United States, 356 US 1, 11, 2 L Ed 2d 545, 553, 78 S Ct 514 (1958). The Court indicated in United States v. Loew's Inc., 371 US 38, 45, 9 L Ed 2d



11, 18, 83 S Ct 97 (1962), that this could be inferred from "the tying product's desirability to consumers or from uniqueness in its attributes."

The Court does not purport to abandon the general rule that some market power in the tying product is essential to a § 1 violation. But it applies the rule to permit proscription of a seller's extension of favorable credit terms conditioned on the purchase of an agreed quantity of the seller's product without any offer of proof that the seller has any market power in the credit market itself. Although the credit extended was for the purchase and development of land on which the purchased

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houses were to be built, the Court's logic dictates the same result if unusually attractive credit terms had been offered simply for the purchase of the houses themselves. Proscription of the sale of goods on easy credit terms as an illegal tie without proof of market power in credit not only departs from established doctrine but also in my view should not be outlawed as per se illegal under the Sherman Act. Provision of favorable credit terms may be nothing more or less than vigorous competition in the tied product, on a basis very nearly approaching the price competition which it has always been the policy of the Sherman Act to encourage. Moreover it is far from clear that, absent power in the credit market, credit financing of purchases should be regarded as a tie of two distinct products any more than a commodity should be viewed as tied to its own price. Since provision of credit by sellers may facilitate competition, since it may provide essential risk or working capital to entrepreneurs or businessmen, and since the logic of the majority's opinion does away in practice with the requirement of showing market

power in the tying product while retaining that requirement in form, the majority's per se rule is inappropriate. I dissent.

In this case there is no offer to prove monopoly or dominance in the tying product—money. And in no sense is the money provided to petitioner unique, even though the terms on which it was furnished and was to be repaid may have been advantageous, and indeed the money itself available from no other source on equally good terms. United States Steel was principally interested in the sale of houses, and petitioner in the economical development of its housing project. Before concluding that the financing arrangements on which U. S. Steel sold its houses amounted to anything more than a price reduction on the houses, or that easy financing t s show that their provider has market

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power in the money market, the Court should have in mind the rationale on which the illegality of tying arrangements is based.

There is general agreement in the cases[1] and among commentators[2] that the fundamental restraint against which the tying proscription is meant to guard is the use of power over one product to attain power over another, or otherwise to distort freedom of trade and competition in the second product. This distortion injures the buyers of the second product, who because of their preference for

[1]E. g., United States 1. Loew's Inc., 371 US 38, 44-45, 9 L Ed 2d 11, 17, 18, 83 S Ct 97 (1962); Northern Pacific R. Co. v. United States, 356 US, 6-7, 2 L Ed 2d 545, 550, 551, 78 S Ct 514 (1958); Times-Picayune Pub. Co. v. United States, 345 US 594, 611, 97 L Ed 1277, 1291, 73 S Ct 872 (1953).

[2]E. g., Report of the Attorney General's National Committee to Study the Antitrust Laws 145 (1955); Austin, The Tying Arrangement: A critique and Some New Thoughts, 1967 Wis L Rev 88; Bowman, Tying Arrangements and the Leverage Problem, 67 Yale LJ (1957); Day, Exclusive Dealing, Tying and Reciprocity—A Reappraisal, 29 Ohio St LJ 539, 540-541 (1938); Turner, the Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv L Rev 50, 60-61 (1958).



the seller's brand of the first are artificially forced to make a less than optimal choice in the second. And even if the customer is indifferent among brands of the second product and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first,[3] such tying

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agreements may work signficant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tied product[4] and, even if he is not, the practice of tying forcloses other sellers of the tied product and makes it more difficult for new firms to enter that market. They must be prepared not only to match existing sellers of the tied product in price and quality, but to offset the attraction of the tying product itself. Even if this is possible through simultaneous entry into production of the tying product, entry into both markets is signficantly more expensive than simple entry into the tied market, and shifting buying habits in the tied product is considerably more cumbersome and less respon-

[3]Theoretically, the tie may do the tier little good unless the buyer is in that position. Even if the seller has a complete monopoly in the tying product, this is the case. The monopolist can exact the maximum price which people are willing to pay for his product. By definition, if his price went up he would lose customers. If he then refuses to sell the tying product without the tied product, and raises the price of the tied product above market, he will also lose customers. The tying link works no magic. However, difficulty in extracting the full monopoly profit without the tie, Burstein, A Theory of Full-Line Forcing, 55 Nw UL Rev 62 (1960), or the marginal advantage of a guaranteed first refusal from otherwise indifferent customers of the tied product, or other advantages mentioned in the text, may make the tie beneficial to its originator.

[4]If the monopolist uses his monopoly profits in the first market to underwrite sales below market price in the second, his monopoly business becomes less profitable. There remains an incentive to do so nonetheless when he thinks he can obtain a monopoly in the tied product as well, permitting him later to raise prices without fear of entry to recoup the monopoly profit he has forgone. But just as the firm whose deep pocket stems from monopoly profits in the tying product may make this takeover, so may anyone else with a deep pocket, from whatever source.

sive to variations in competitive offers.[5] In addition to these anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product;[6] they may be used as a counting device to effect price discrimination;[7] and they may be used to force a full line of products on the customer[8] so as

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to extract more easily from him a monopoly return on one unique product in the line.[9]

All of these distortions depend upon the existence of some market power in the tying product quite apart from any relationship which it might bear to the tied product. In this case, what proof of any market power in the tying

[5]Even when the terms of the tie allow a competitor to obtain the business in the tied product simply by offering a price lower than, rather than equal to, the tier's, the Court has found sufficient restriction in the tied product, as in the Northern Pacific case.

[6]Bowman, Tying Arrangements and the Leverage Problem, 67 Yale LJ 19, 21-23 (1957).

[7]Id., at 23-24.

[8]Burstein, A. Theory of Full-Line Forcing, 55 Nw UL Rev 62 (1960).

[9]Tie-ins may also at times be beneficial to the economy. Apart from the justifications discussed in the text are the following. They may facilitate new entry into fields where established sellers have wedded their customers to them by ties of habit and custom. Brown Shoe Co. v. United States 370 US 294, 330, 8 L Ed 2d 510, 533, 82 S Ct 1502 (1962); Note, Newcomer Defenses: Reasonable Use of Tie-ins, Franchises, Territorials, and Exclusives, 18 Stan L Rev 457 (1966). They may permit clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market. They may protect the reputation of the tying product if failure to use the tied product in conjunction with it may cause it to misfunction. Compare International Business Machines Corp. v. United States, 298 US 131, 138-140, 80 L Ed 1085, 1090, 1091, 56 S Ct 701 (1936), and Standard Oil Co. v. United States, 337 US 293, 306, 93 L Ed 1371, 1382, 69 S Ct 1051 (1949), with Pick Mfg. Co. v. General Motors Corp., 80 F 2d 641 (CA 7th Cir 1935), aff'd, 299 US 3, 81 L Ed 4, 57 S Ct 1 (1936). And, if the tied and tying products are functionally related, they may reduce costs through economies of joint production and distribution. These benefits which may flow from tie-ins, though perhaps in some cases a potential basis for an affirmative defense, were not sufficient to avoid the imposition of a per se proscription, once market power has been demonstrated. But in determining whether even the market-power requirement should be eliminated, as the logic of the majority opinion would do, extending the per se rule to absolute dimensions, the fact that tie-ins are not entirely unmitigated evils should be borne in mind.



product has been alleged? Only that the tying product—money—was not available elsewhere on equally good terms, and perhaps not at all. Let us consider these possibilities in turn.

First, if enough money to proceed was available elsewhere and U. S. Steel was simply offering credit at a lower price, in terms of risk of loss, repayment terms, and interest rate, surely this does not establish that U. S.

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Steel had market power by any measure in the money market. There was nothing unique about U. S. Steel's money except its low cost to petitioner. A low price on a product is ordinarily no reflection of market power. It proves neither the existence of such power nor its absence, although absence of power may be the more reasonable inference. On who has such power benefits from it precisely because it allows him to raise prices, not lower them, and ordinaritly he does so.

A low price in the tying product—money, the most fungible item of trade since it is by definition an economic counter—is especially poor proof of market power when untied credit is available elsewhere. In that case, the low price of credit is functionally equivalent to a reduction in the price of the houses sold. Since the buyer has untied credit available elsewhere, he can compare the houses-credit package of U. S. Steel as competitive with the price of the untied credit plus the cost of houses from another source. By cutting the price of his houses, a competitor of U. S. Steel can compete with U. S. Steel houses on equal terms since U. S. Steel's money is no more desirable to the purchaser than money from another source except in point of price. The same money which U. S. Steel is willing to risk or forego by providing better credit terms it could sacrifice by cutting the price of houses. There is no good

reason why U. S. Steel should always be required to make the price cut in one form rather than another, which its purchaser prefers.

Provision of credit financing by the seller of a commodity to its buyer is a very common event in the American economy. Often the seller is not willing to supply credit generally for the business and personal needs of the public at large, but restricts his credit to the purchasers of the commodity which he is principally in the business of selling. In all such cases, the commodity

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may be viewed as tied to the credit. In all such cases, the money itself is no more desirable from one source than from another. But in all such cases, under the majority opinion, the mere fact that the credit is offered on uniquely advantageous terms makes the transaction a per se violation of § 1 of the Sherman Act. And so long as the buyer has chosen to accept the seller's credit terms over any others available to him, the buyer, like petitioner here, must have viewed them as uniquely advantageous to him. The logic of the majority opinion, then, casts great doubt on credit financing by sellers. I would not proscribe credit financing by sellers who had no independently demonstrable power in the credit market. Unlike the majority, I am unable to read petitioner's affidavits, the fruit of years of pretrial discovery, to offer any independent proof whatever of such market power.[10]

[10] I agree with the majority that the affidavits are not *inconsistent* with a "possibility of market power" and that such power might be shown by showing certain kinds of "unique economic ability." But I cannot see how petitioner offers to prove this, although by taking judicial notice of the posibility that U. S. Steel may have operated free of legal restraints on other lenders otherwise willing to provide 100% financing—a possibility not mentioned by petitioner—the majority suggests to petitioner an element of the sort of detailed description of one facet of the credit market which, with much more information about the whole of the market, would be relevant. But this was not the basis on which petitioner offered to go to trial and I would not remand for trial even under the applicable Poller standard.



Second, adopting the other assumption, that sufficient credit to go forward with the enterprise was simply unavailable to petitioner from any other source at all, the result in this case is even worse. Were it not for the credit extended by U. S. Steel, petitioner would have been unable to carry out its development. U. S. Steel would not have foreclosed anyone from selling

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houses to petitioner since no one would have sold any houses to petitioner. A seller who is willing to take credit risks which no one else finds acceptable is simply engaging in the hard and risky competition which it is the policy of the Sherman Act to encourage. And if he may not do so, then those businesses and entrepreneurs who depend for their survival and growth or for the initiation of new enterprises on the availability of credit financing from sellers may well fail for lack of credit availability from other sources. Of course, if the credit was unavailable elsewhere because U. S. Steel was a monopolist of credit in a relevant market—which petitioner does not assert—the tie would be illegal. But here it was evidently unavailable elsewhere simply because others were not willing to match U. S. Steel's relatively low price for acceptance of high risk.

Neither petitioner nor the Court asserts that under prior antitrust doctrine U. S. Steel would have violated § 1 of the Sherman Act or § 3 of the Clayton Act[11] if it had simply contracted to supply all the houses Fortner required to develop the particular tract of land involved here—a requirements contract for the development—even if the price for the houses was particularly advantageous. What triggers the application of the antitrust laws is the asserted tying arrangement, the sale of one product conditioned on

[11] 38 Stat 731, 15 USC § 14.

the purchase of another. And it is not all tying transactions in general but only those where leverage in one market has been used to distort another which so far have been held illegal restraints of trade. The basis for the rule is clear where the seller is dominant in the tying product market, where the product is patented, or where it is in short supply. In these cases the restraint on competitors in the tied product as well as on buyers of the tying product

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is reasonably apparent. But I question that buyers' acceptance of the tie-in—the simple fact that there are customers—will always suffice to prove market power in the tying product. Where the seller exercises no market power in the tying item but buyers prefer the tie-in because the seller offers the tying product on favorable terms—where the price is unusually low or where the seller gives the product away conditioned on buying other merchandise—the seller in effect is merely competing in the tied product market. Buyers are not burdened. They may buy both tied and tying products elsewhere on normal terms. Nor are the seller's competitors restrained. The economic advantage of the tie-in to buyers can be matched by other sellers of the tied product by offering lower prices on that product. Promotional tie-ins effected by underpricing the tying product do not themselves prove there is any market power to exercise in that product market, unless the economic resources to withstand lower profit margins and the willingness to compete in this manner are themselves suspect. If they are, however, they should as surely taint and muffle hard price competition in the tied market itself, a result which, short of a § 2 violation, it would be difficult to reach under the Sherman Act.



I cannot join such a complete evisceration of the requirement that market power in the tying product be shown before a tie-in becomes illegal under § 1. Certainly it is unnecessary to erect a § 1 per se ban on promotional tie-ins in order to protect the tied product market. If the resulting exclusion of competitors is of sufficient significance to threaten competition in that market, the transaction may be reached as a requirements contract under § 3 of the Clayton Act.[12] If the

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promotional tie is in effect price discrimination, that too can be examined under statutes designed for that purpose.[13] Moreover, the transaction could be dealt with as an unfair method of competition under § 5 of the Federal Trade Commission Act, 38 Stat 719, as amended, 15 USC § 45. For example, in Hastings Mfg. Co. v. FTC, 153 F2d 253 (CA 6th Cir), cert. denied, 328 US 853, 90 L Ed 1626, 66 S Ct 1344 (1946), it was, inter alia, held an unfair method of competition for a seller of piston rings, ranking sixth or seventh in the industry, to attempt to obtain exclusive dealers or preferential dealers by guaranteeing profits to the dealers and making loans to them, tied to the purchase of the piston rings. Relying on the expertise of the FTC and the precedents of this Court, the Court of Appeals concluded that although it "is not illegal for a manufacturer to finance his retail outlets," 153 F 2d, at 257 (a proposition called into question by today's decision) tying this to exclusive or preferential dealing was an unfair method of competition.

The principal evil at which the proscription of tying aims is the use of power in one market to acquire power in,

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[12] The arrangements proscribed by § 3 relate only to "goods, wares, merchandise, machinery, supplies, or other commodities. . . ." 38 Stat 731, 15 USC § 14.

[13] Robinson-Patman Price Discrimination Act, 49 Stat 1526, as amended, 15 USC § 13 et seq.

or otherwise distort, a second market. This evil simply does not exist if there is no power in the first market. The first market here is money, a completely fungible item. I would not apply a per se rule here without independent proof of market power. Cutting prices in the credit market is more likely to reflect a competitive attempt to offset the market power of others in the tied product than it is to reflect existing market power in the credit market. Those with real power do not offer uniquely advantageous deals to their customers; they raise prices.

This is not, of course, to say that if market power were proved in the tying product the per se rule would

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be inapplicable, or that it is necessarily impossible to prove market power in the credit market. There may be so few suppliers of credit in a certain relevant market, for example, that they have the power among them to manipulate the price and terms of credit, not necessarily by conspiracy, but by parallel behavior. Through proof that such a situation existed, or through proof of some other sort, an antitrust plaintiff might be able to show market power in the credit market, and if this were coupled with a tie I would consider the arrangement per se illegal under conventional antitrust doctrine. However, I do not consider petitioner's allegations that U. S. Steel lowered its price of credit sufficient to establish market power in credit and I can find no offer by petitioner of the necessary supplementary proof.

Mr. Justice Fortas, with whom Mr. Justice Stewart joins, dissenting.

I share my Brother White's inability to agree with the majority in this case, and, in general, I subscribe to his opinion. I add this separate statement of the reasons for my dissent.



The facts of this case are materially different from any tying case that this Court has heretofore decided. The tying doctrine originated in situations where the seller of product A offers it for sale only on the condition that the buyer also agree to buy product B from the seller. In International Salt Co. v. United States, 332 US 392, 92 L Ed 20, 68 S Ct 12 (1947), for example, the company leased its patented machines on the condition that the lessee agree to use only International's salt products in the machines. In Northern Pacific R. Co. v. United States, 356 US 1, 2 L Ed 2d 545, 78 S Ct 514 (1958), the railroad leased land from its vast holdings on condition that the lessee accept "preferential routing" clauses compelling the lessee to ship on the

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railroad's lines all commodities produced or manufactured on the land unless another railroad offered more favorable terms.

Although the tying doctrine originated under the specific language of § 3 of the Clayton Act, Northern Pacific was necessarily a Sherman Act case, because the Clayton Act provision applies only to "goods, wares, merchandise, machinery, supplies, or other commodities," and not to land. But Northern Pacific, in effect, applied the same standards to tying arrangements under the Sherman Act as under the Clayton Act, on the theory that the anticompetitive effect of a tie-in was such as to make the difference in language in the two statutes immaterial. The present case, like Northern Pacific, is also exclusively a Sherman Act proceeding. But, here, U. S. Steel is not selling or leasing land subject to an agreement that its prefabricated houses be used thereon. If these were the facts, and if U. S. Steel controlled enough land within an economically demarcated area or "market," however defined, the case

might well be governed by Northern Pacific. But, here, U. S. Steel is not selling or providing land. It is selling prefabricated steel houses to be erected in a subdivision and it is providing financing for the land acquisition, improvement, development, and erection costs. Most of the financing is related not to the land cost but to the purchase and installation of the houses.

U. S. Steel neither owned nor controlled any of the land involved in the venture. On the contrary, the building lots constituting the subdivision on which the houses were to be built were owned by another company of which the principal owner was Mr. Fortner, who owned the petitioner. Nor is U. S. Steel selling credit in any general sense. The financing which it agrees to provide is solely and entirely ancillary to its sale

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of houses. Under contract terms of a familiar sort in subdivision development, the credit advances are geared to progressive stages of the subdivision development and the purchase, erection, and resale of the houses.

U. S. Steel approached the petitioner seeking to sell it prefabricated steel houses to be erected on the land which Mr. Fortner's other company owned. In October 1960, after lengthy discussion, U. S. Steel offered, through its Credit Corporation, to lend petitioner about $2,000,000. This sum was to be secured by mortgages on the lots. The mortgage notes carried 6% interest, and petitioner also agreed to pay a "Service Fee" of ½ of 1% of the principal amount of the notes. Provisions were made to insure that the funds would be progressively advanced and used for land acquisition (from Mr. Fortner's other company), for development and improvement of the area preparatory to construction, and for the purchase and erection of the houses themselves. Petitioner was obligated to erect on each lot



a prefabricated house manufactured by U. S. Steel. Of the total of about $2,000,000 to be advanced, $1,700,000 was to be disbursed against purchase and installation of the houses from U. S. Steel and the balance for land acquisition and development.

The Court holds that this was a "tying" agreement, and that, therefore, the extraordinarily onerous incidents of per se illegality which this Court has attached to "tying" agreements must apply here as well.

I cannot agree. This is a sale of a single product with the incidental provision of financing. It is not a sale of one product on condition that the buyer will not deal with competitors for another product or will buy the other product exclusively from the seller.

As my Brother White shows, to treat the financing of the housing development as a "tying" product for the houses is to distort the doctrine and to depart from

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the reason for its existence. Such an extension of the tying doctrine entirely departs from the factual pattern which is described in § 3 of the Clayton Act and which has been the basis of this Court's extension of the doctrine to the Sherman Act and its development of the rule that such tying arrangements are illegal on a per se basis—i. e., without any showing that they constitute an unreasonable restraint of trade or tend to create a monopoly. The Court has established this rule because the kind of tying arrangement at issue in prior cases involved the use of a leverage position in the tying product—the patented machine, the copyrighted film, the unique land—to force the buyer to purchase the tied product. To apply this rule to a situation where the only "leverage" is a lower price for the article sold or more advantageous financing or credit terms for the article sold and for ancillary costs connected with the

sale is to distort the doctrine, and, indeed, to convert it into an instrument which penalizes price competition for the article that is sold.

It is, of course, not inconceivable that a case might arise where § 1 or § 2 of the Sherman Act would outlaw a combination of sale and credit on a specific showing of market power and anticompetitive effect. It is also possible that such a combination might, in some situations, constitute "unfair methods of competition" in violation of § 5 of the Federal Trade Commission Act, or price discrimination or furnishing services on discriminatory terms, in violation of § 2 of the Clayton Act, as my Brother White suggests. The majority, however, does not rely on any such analysis of the actualities of market power or anticompetitive effect, but sweeps this kind of credit arrangement within the per se ban.†

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The effect of this novel extension—this distortion, as I view it—of the tying doctrine may be vast and destructive. It is common in our economy for a seller to extend financing to a distributor or franchisee to enable him to purchase and handle the seller's goods at retail, to rent

†The case is remanded for trial. I find it difficult to learn from the majority opinion just what is to be determined at that trial. Some parts of the discussion suggest that petitioner must establish that U. S. Steel had the market power over credit by showing facts in no way suggested at this stage by the pleadings. At another point the majority even suggests that if U. S. Steel can show "legitimate business purposes" and the absence of "competitive advantage" (ante, at 506, 22 L Ed 2d at 506) in the credit market, it will have made out a defense. But in an earlier part of the opinion, the majority says explicitly that "it is clear that petitioner raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the per se doctrine." (Ante, at 500-501, 22 L Ed 2d at 503.) If it is this sentence which determines the range of issues open on remand there will be no examination at the trial of the business or economic background of the credit arrangements here attacked or of the effects, if any, of this arrangement on competition in the prefabricated house market. All petitioner will need to do is show that U. S. Steel did indeed condition the extension of its subsidiary's credit on an agreement to purchase U. S. Steel profabricated houses and it will have demonstrated the automatic illegality of the credit arrangement.



retail facilities, to acquire fixtures or machinery for service to customers in connection with distribution of the seller's goods, or, as here, to prepare the land for and to acquire and erect the seller's houses for sale to the public. It is hardly conceivable, except for today's opinion of the Court, that extension of such credit as a part of a general sale transaction or distribution method could be regarded as a ('tying" of the seller's goods to the credit, so that where the businessman receiving the credit agrees to handle the seller-lender's product, the arrangement is per se unlawful merely because the amount or terms of the credit were more favorable than could be obtained from banking institutions in the area. Arrangements of this sort run throughout the economy. They frequently,

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and perhaps characteristically, represent an indispensable method of financing distributive and service trades, and not until today has it been held that they are tying arrangements and therefore per se unlawful. Cf. Standard Oil Co. v. United States, 337 US 293, 315, 321, 93 L Ed 1371, 1386-1388, 1389, 69 S Ct 1051 (1949) separate opinion of Douglas, J., and dissenting opinion of Jackson, J.).

In the present case in every respect, the provision of credit for construction of the houses and other associated costs of developing the subdivision, was, from U. S. Steel's point of view, ancillary and subordinated to the sale of the houses. The Credit Corporation did not operate at a loss, but its profit was comparatively low. Provision of special financing to the prospective purchaser of prefabricated houses by the Credit Corporation was intimately and exclusively related to the end object of the sale of the houses by the Homes Division. It was not a separate item of "sale."

This pattern is by no means limited to the provisions of financing, nor can the impact of the majority's opinion be so limited. Almost all modern selling involves providing some ancillary services in connection with making the sale—delivery, installation, supplying fixtures, servicing, training of the customer's personnel in use of the material sold, furnishing display material and sales aids, extension of credit. Customarily—indeed almost invariably —the seller offers these ancillary services only in connection with the sale of his own products, and they are often offered without cost or at bargain rates. It is possible that in some situations, such arrangements could be used to restrain competition or might have that effect, but to condemn them out-of-hand under the "tying" rubric, is, I suggest, to use the antitrust laws themselves as an instrument in restraint of competition.

For these reasons, I dissent.



**PROPOSED INSTRUCTIONS TO THE JURY ON SECTION TWO OF THE SHERMAN ACT, TENDERED BY THE DEFENDANTS**—Filed June 25, 1970.

The relevant market area is that area in which the Homes Division marketed its products during the period 1960-1961, in competition with other builders of single family dwellings and other manufacturers of prefabricated homes, which area, according to the evidence includes the 29 states in which such sales were made during that time by the Homes Division.

Bearing in mind the relevant market area you must determine if the contract in question monopolized or attempted to monopolize the relevant market. The word "monopolized" does not mean the same thing as the word "monopoly." There is nothing unlawful under the Sherman Act for anyone to obtain or try to obtain, all of the market through skill, efficiency, superiority of product, competitive activities or other lawful means. Rather, one can be found to have monopolized a market, or to have attempted to monopolize a market, only if it is proven by a preponderance of the evidence that he or it intentionally acquired, by exclusionary means such power in the market as to give him or it the ability to prevent other persons from entering and competing in that market and the ability to raise prices without regard to competitive forces.

Monopolization or an attempt at monopolization is a fact which must be proven by a preponderance of the evidence. It cannot be established by economic theory, by assertion or by assumption.

Therefore plaintiff, in order to sustain its burden of proof as to this allegation of monopolization or attempted monopolization and to be entitled to money damages as a result thereof, must prove by a preponderance of the evi-

dence, each and everyone of the four elements below enumerated:

1. That the defendants conspired to exclude competitors from the relevant market and that as a result thereof the United States Steel Corporation was empowered to raise its prices without regard to competitive forces.

2. That the defendants acquired such ability to exclude competitors, if at all, by the use of the provision in the Loan Agreement requiring plaintiff to build United States Steel Homes on the 219 building lots purchased with money borrowed from the Credit Corporation.

3. That it was the specific intent of the provision of the Loan Agreement above mentioned to monopolize the market and destroy competition and that it had no other legitimate purpose.

4. That plaintiff was injured, if at all, as a direct result of such monopolization or attempt at monopolization.

If the plaintiff fails to meet its burden of proving any one of these four elements by a preponderance of the evidence, then you must find for the defendants on the claim made under Section Two of the Sherman Act.

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Attorneys for the Defendants



**PROPOSED INSTRUCTIONS TO THE JURY TENDERED BY THE DEFENDANTS**—Filed June 25, 1970.

As I earlier told you and as you have heard throughout the trial, this is an anti-trust action, instituted by the plaintiff Fortner Enterprises, Inc., a corporation, against the defendants United States Steel Corporation and U. S. Steel Homes Credit Corporation, also both corporations, for damages which it claims arose out of a claimed violation of the federal anti-trust laws. I will give you the pertinent provisions of these laws in a few moments.

The issues of fact which you are to determine in this case are as follows:

Whether the defendant Credit Corporation was, at all times material to this action, party to unlawful contracts in restraint of interstate trade and commerce in prefabricated home packages, in violation of Section 1 of the Sherman Act.

If you find the contracts unlawful, whether the plaintiff was damaged as a direct result of such unlawful contract.

You may not presume that the defendants are liable simply because plaintiff has instituted this suit in which it makes claims or contentions against the defendants, and neither may you presume that the defendants are not liable simply because they have denied the contentions or claims made by the plaintiff.

In order to recover against either or both of the defendants, plaintiff has the burden of proof to establish by a preponderance of the evidence each of the following elements:

1. That the contracts in question were unlawful, within the meaning of the anti-trust laws. The regulations and laws which restrict loans by bank and building and loan associations do not apply to the defendant Credit Corpora-

tion or similar types of lenders, including individuals, insurance companies, building material suppliers, etc.

2. That the contracts in question, if unlawful, was forced onto the plaintiff against his will.

3. That as a direct result thereof, the foregoing was the proximate cause of financial loss to plaintiff's business.

The term "burden of proof" means the obligation to prove or establish a fact by a preponderance of the evidence.

The term "preponderance of the evidence" means that evidence on a particular matter which, when fully, fairly and impartially considered by you, has a greater weight with you, produces a stronger impression and is more convincing to you as to its truth than that to which it is opposed.

Unless you find that the plaintiff has established the existence of all three elements by a preponderance of the evidence you must find for the defendants.

At the outset of this case, I told you that plaintiff contended that the defendants had violated both Sections I and 2 of the Sherman Act. The contention regarding Section 2 of the Sherman Act is withdrawn from your consideration, and you are to concern yourselves only with the claimed violation of Section 1 of that act.

The purpose of Section 1 of the Sherman Act is to preserve competition for the benefit of the public, by preventing acts which constitute unreasonable restrictions upon business competition in interstate trade or commerce.

As used in Section 1 of the Sherman Act, the term "restraint of trade or commerce" means an unreasonable suppression or elimination of competition in the purchase or sale of goods or services. Thus, only unreasonable restraints are prohibited.



Under Section 1 of the Sherman Act intent is not a necessary element of the offense. The test is rather the result and effect. Did the contract here promote or create competition or did they result in an unreasonable restraint of trade?

There cannot be a violation of Section 1 of the Sherman Act, as applied to this case, unless you find that the Corporation at the time the two contracts were made, so dominated the money lending market to the exclusion of others, that it could use this domination to force the plaintiff to buy home packages from the Homes Division which it did not need or want. Even though you may find that the credit terms of the Credit Corporation were desirable, this, by itself, does not prove that Credit Corporation dominated the money lending market.

If the defendants can show or have shown that there was a bona fide and reasonable business necessity for the arrangement, then you shall find for the defendants regardless of your views as to the other matters to which I have previously referred.

Should you find that there has been a violation of Section 1 of the Sherman Act, in that the arrangement unreasonably restrains interstate trade or commerce, then you must further determine, before the plaintiff can effect a recovery, whether such violation proximately caused damage to the plaintiff. Damages and their cause, like any other proposition, must be proved by a preponderance of the evidence and this is the burden of the plaintiff.

In connection with the assessment of the amount of damage you are expressly directed to disregard any evidence you have heard concerning the comparative prices between conventional building costs, the cost of the Empire Homes package and the cost of the Homes package furnished by the Homes Division. Plaintiff has not sought

damages on this account, having elected to rely on other measures of claimed damages to effect a monetary recovery.

Nor in assessing the amount of the damages, if any, may you consider any testimony offered by plaintiff on the difference between the appraised value of its property sold at the foreclosure sale and the amount it brought at such sale, since the record shows without dispute that the property brought more at such sale than the appraised value, based on its sale in three groups and that the sale in the groups was the most efficient manner in which to sell it.

Plaintiff claims loss of profits, on a projected basis. Should you find, from a preponderance of the evidence that defendants violated Section 1 of the Sherman Act, then you may award plaintiff damages, if any, not to exceed $127,670.96. Even if you should find for the plaintiff you are not required however, to award that sum or any sum. You may award such lesser sum as you believe to be fair and reasonable, or no damages, if you find that the damages were not proximately caused by the arrangement. And in determining the amount of damage you may not engage in guess work or speculation.

As in all cases plaintiff itself had a duty to reduce its own damages. The plaintiff is not to recover for damages it could have avoided through the exercise of reasonable efforts. Thus if you believe that plaintiff could have continued in business and by so doing could have reduced its losses, if any, or made a profit, then, to that extent, you should reduce any award to plaintiff.

The fact that I am instructing you on the measure of damages, does not mean that I am of the opinion that plaintiff is entitled to recover damages in this case. I am expressing no opinion on that subject one way or the other.



Such instructions on damages are given to guide you in arriving at the amount of damages only in the event you find, that in fact, from a preponderance of the evidence that plaintiff is entitled to recover damages.

In your determination of the issues in this case you should give no consideration whatsoever to the fact that the parties are corporations or to the fact that one or more of them may be, relatively speaking, large corporations. A corporation whether large or small, rich or poor, is entitled to the same consideration you would give to any natural person.

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Attorneys for the Defendants

**PLAINTIFFS' TENDERED INSTRUCTIONS—**
**Filed June 29, 1970.**

PLAINTIFF'S TENDERED INSTRUCTION 1

In a complex trial, such as this one which is brought under the antitrust laws, many issues of law are presented for decision along with the issues of fact which you have so patiently and attentively listened to over the past several weeks of trial.

It is the function of the jury to determine issues of disputed fact. However, it is the sole province of the Court to decide those matters which may be decided as a matter of law, consistent with the responsibilities of my office and the legal precedents and authorities which have been presented for my consideration.

Ladies and Gentlemen of the Jury, you have patiently heard all of the evidence, and I wish to assure you that the Court, counsel and the litigants are grateful to you. However, after hearing and reviewing all of the evidence in this case, and following a number of discussions with the attorneys for both sides, I have decided several of the issues as a matter of law.

The arrangement whereby the defendants required the plaintiff to purchase and erect in its Golden Meadows Subdivision only prefabricated house packages purchased from the Homes Division of United States Steel Corporation is a tying arrangement; the defendant, U. S. Steel Homes Credit Corporation, possessed sufficient economic power to induce its customers to purchase the tied products, the house packages, and a not insubstantial dollar volume of interstate commerce in the tied products has been adversely affected. The Court therefore holds as a matter of law that this tying arrangement is illegal under the antitrust law. The Court further finds that the defendants engaged in a conspiracy to establish said illegal tying



arrangement and that both defendants are responsible for it.

Accordingly, after I have completed all of my instructions to you, you are directed to retire to the Jury Room and return a verdict in favor of the plaintiff on the issue which I have directed you to find, as a matter of law, in favor of the plaintiff. A form of verdict, entitled "Directed Verdict On Certain Issues—Special Verdict No. 1," will be submitted to you for this purpose. Your foreman is to sign this verdict form in accordance with these instructions.

PLAINTIFF'S TENDERED INSTRUCTION 2

Although you as jurors are the sole judges of the facts with respect to the issues tendered, you are duty bound to follow the law as stated in the instructions of the Court and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court.

PLAINTIFF'S TENDERED INSTRUCTION 3

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in

evidence, all facts which have been admitted or stipulated, all facts and events which have been judicially noticed, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience.

PLAINTIFF'S TENDERED INSTRUCTION 4

In order to prove the essential elements of plaintiff's case, the burden is upon the plaintiff to establish by a preponderance of the evidence in the case, the following facts:

First, that the defendants have violated the antitrust laws. The Court has already directed a verdict in plaintiff's favor on this point.

Secondly, that the defendants' violations were a proximate cause of some injury and consequent damage sustained by the plaintiff in its business and/or property.

To establish a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

PLAINTIFF'S TENDERED INSTRUCTION 5

You must determine whether the antitrust violation was the direct and proximate cause of injury and damage



to plaintiff's business or property. An injury or damage to plaintiff's business or property is proximately caused whenever it appears that the antitrust violation played a substantial part in actually bringing about or causing the injury or damage and it further appears that the injury or damage was either a direct result or a reasonably probable consequence of the antitrust violation.

PLAINTIFF'S TENDERED INSTRUCTION 6

If, under the instructions of the Court, you should find that the plaintiff is entitled to a verdict, the law provides that the plaintiff is to be fairly compensated for all damage, if any, to his business or property, which was proximately caused by the defendants' conduct in violation of the antitrust laws. In arriving at the amount of the award, you should include all damages suffered by the plaintiff because of lost profits; that is to say, profits which the plaintiff would have made but for violation by defendants of the autitrust laws.

If you find that the plaintiff has in fact suffered damage to his business or property, such as a loss in profits, proximately caused by the illegal conduct of the defendants complained of, then the circumstance that the precise amount of plaintiff's damages may be difficult to ascertain should not affect plaintiff's recovery, particularly where the defendants' wrongdoings have caused the difficulty in determining the precise amount. On the other hand, the plaintiff is not to be awarded remote or purely speculative damages. An allowance for lost profits may be included in the damages awarded, only when there is some reasonable basis in the evidence for determining that plaintiff has in fact suffered a loss of profits, even though the amount of such loss is difficult of ascertainment.

In arriving at the amount of any loss or profits sustained by plaintiff, the jury are entitled to consider any past

earnings of the plaintiff in the business in question, as well as any other evidence bearing upon the issue.

Your whole award on account of lost profits is not to exceed the sum of $197,000.00, the amount claimed.

In arriving at the amount of the award, you should, in addition to lost profits, include all damages suffered by the plaintiff for the loss of its property, if any, which was proximately caused by the defendants' conduct in violation of the antitrust laws, not to exceed on this account the sum of $_____, the amount claimed.

Under the law the defendant, Credit Corporation, had a right to counterclaim to foreclose on the plaintiff's property. However, if you find that plaintiff suffered a loss in the value of its property as a result of the foreclosure and that that loss, if any, was caused by the defendants' antitrust violation, then you should award plaintiff damages as set forth above.

PLAINTIFF'S TENDERED INSTRUCTION 7

When you retire to the jury room to deliberate, you will select one of your number as a foreman or forelady and he, or she, will sign your verdict for you when it has been agreed upon, and he, or she, will represent you as your spokesman in the further conduct of this case in this Court.

PLAINTIFF'S TENDERED INSTRUCTION 8

When you retire to the jury room, after the election of a foreman, you should first dispose of the directed verdict on certain issues (Special Verdict No. 1). The foreman is to sign this verdict form on your behalf in accordance with earlier instructions.

You should then determine if the defendants' violation of the autitrust laws has been a proximate cause of any injury to the plaintiff's business or property.



If your answer to this question is "No", then you should return a verdict for defendants; but if your answer is "Yes", you then should return a verdict for the plaintiff for such damage to plaintiff's business or property as you find has been proximately caused by the conduct of the defendants in violation of the antitrust laws.

PLAINTIFF'S TENDERED INSTRUCTION 9

The Court wishes also to caution you that if it becomes necessary for the jury to communicate with the Court during its deliberation, or upon its return to court, respecting any matter connected with the trial of the case, you should not indicate to the Court in any manner how the jury stands, numerically or otherwise, on the questions presented. This caution the jury should observe at all times after the case is submitted to it, and until the jury has finally reached a verdict or has failed to agree.

PLAINTIFF'S TENDERED INSTRUCTION 10

The Court finds as a matter of law that neither A. B. Fortner, Jr., nor any of the corporations which he owned or controlled had any duty to put additional capital into the plaintiff, Fortner Enterprises, Inc., during the period of time about which you have heard evidence.

PLAINTIFF'S TENDERED INSTRUCTION 11

During the course of a trial, I occasionally ask questions of a witness, in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related. Remember at all times that you, as jurors, are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts.

PLAINTIFF'S TENDERED INSTRUCTION 12

It is the duty of the Court to admonish an attorney who, out of zeal for his cause, does something which is not in keeping with the rules of evidence or procedure.

You are to draw no inference against the side to whom an admonition of the Court may have been addressed during the trial of this case.

PLAINTIFF'S TENDERED INSTRUCTION 13

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible.

When the Court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer.

Upon allowing testimony or other evidence to be introduced over the objection of counsel, the Court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As state before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

PLAINTIFF'S TENDERED INSTRUCTION 14

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations,



do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

The foregoing Instructions 1 through 14 are hereby respectfully submitted on behalf of plaintiff.

Kenneth L. Anderson

A. Scott Hamilton, Jr.
Counsel for Plaintiff

SPECIAL VERDICT NUMBER 1

In accordance with the Court's Instructions, we the jury find that the arrangement whereby the defendants required the plaintiffs to purchase and erect in its Golden Meadows Subdivision only prefabricated house packages purchased from the Homes Division of United States Steel Corporation is a tying arrangement; that the defendant, U. S. Steel Homes Credit Corporation, possessed sufficient economic power to induce customers to purchase the tied products, the house packages, and that a not insubstantial dollar volume of interstate commerce in the tied products has been adversely affected and that a tying arrangement is illegal under the antitrust laws and that the defendants engaged in a conspiracy to establish said illegal tying arrangement.

Foreman of the Jury

SPECIAL VERDICT NUMBER 2

1. Has the defendants' violation of the antitrust laws been a proximate cause of any injury to the plaintiff's business and/or property?

_____

[Yes or No]

_____

Foreman of the Jury

SPECIAL VERDICT NUMBER 3

If your answer to the question in Special Verdict Number 2 is "No" that you should return a verdict for the defendants; but if your answer is "Yes" that you should return a verdict for the plaintiff for such damage to plaintiff's business and/or property as you find has been proximately caused by the conduct of the defendants in violation of the antitrust laws.

We the jury in the above entitled cause, find in favor of the plaintiff, Fortner Enterprises, Inc., and against the defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, and assess the plaintiff's damages for loss of profits in the amount of $_____ [not to exceed the amount of $197,000.00] and assess the plaintiff's damages for the loss of its property, if any, in the amount of $_____ [not to exceed the amount of $52,739.00].

_____

Foreman of the Jury

_____

Date

SPECIAL VERDICT NUMBER 4

We, the jury in the above entitled cause find in favor of the defendants, United States Steel Corporation and



U. S. Steel Homes Credit Corporation, and against the plaintiff, Fortner Enterprises, Inc.

_____

Foreman of the Jury

_____

Date

PRELIMINARY STATEMENT TO THE JURY

In a complex trial, such as this one which is brought under the antitrust laws, many issues of law ar presented for decision along with the issues of fact which you have so patiently and attentively listened to over the past several weeks of trial.

It is the function of the jury to determine issues of disputed fact. However, it is sole province of the Court to decide those matters which may be decided as a matter of law, consistent with the responsibilities of my office and the legal precedents and authorities which have been presented for my consideration.

Ladies and Gentlemen of the Jury, you have patiently heard all of the evidence, and I wish to assure you that the Court, counsel and the litigants are grateful to you. However, after hearing and reviewing all of the evidence in this case, and following a number of discussions with the attorneys for both sides, I have decided several of the issues as a matter of law.

The arrangement whereby the defendants required the plaintiff to purchase and erect in its Golden Meadows Subdivision only prefabricated house packages purchased from the Homes Division of United States Steel Corporation is a tying arrangement; the defendant, U. S. Steel Homes Credit Corporation, possessed sufficient economic power to induce its customers to purchase the tied products, the house packages, and a not insubstantial dollar volume of

interstate commerce in the tied products has been adversely affected. The Court therefore holds as a matter of law that this tying arrangement is illegal under the antitrust laws. The Court further finds that the defendants engaged in a conspiracy to establish said illegal tying arrangement and that both defendants are responsible for it. As a consequence, the issues left for your determination are whether the illegal tying agreement caused the plaintiff damage and, if so, the amount of its monetary damages, and for that reason the arguments of counsel will be limited to these issues.

Tendered by:

_____

Kenneth L. Anderson

_____

A. Scott Hamilton, Jr.
Counsel for Plaintiff

**JURY VERDICT**—Entered June 29, 1970.

"We, the Jury, pursuant to the direction of the Court, find for the plaintiff on the issues of liability under the provisions of the antitrust laws applicable to this case.

/s/ Marion E. Johnson,
Foreman"

June 29, 1970

**JURY VERDICT**—Entered June 30, 1970.

Jury verdict as follows returned in open court on trial begun 6/1/70:

"We, the Jury, find for the plaintiff on the issue of damages and award it the sum of $93,200.00.

/s/ Leroy J. Hubrich,
Foreman"

June 30, 1970



**TRIAL ORDER**—Filed June 30, 1970.

This case was called in open court on June 1, 1970, for the purpose of disposing of certain trial preliminaries, such as the identifying of exhibits, etc. There appeared Hon. Kenneth L. Anderson and Hon. A. Scott Hamilton, Jr., for the plaintiff, and Hon. Albert F. Reutlinger and Hon. Carl Henlein for the defendants.

Court reconvened on June 2, 1970, for beginning of actual trial of the case. Both sides announced ready, and the following jury was impaneled and sworn:

| | |
|---|---|
| Conley E. Brian | Marion E. Johnson |
| Benny L. Little | Davis Kays |
| Leroy J. Hubrich | Mrs. Roberta A. Nation |
| Mrs. Elizabeth Q. Hagan | Thomas R. Fowler |
| Elzie R. Lucas | Mrs. Martha Nell Robertson |
| William Elwood Mitchell | Fred J. Carr, Jr. |

Alternates: Mrs. Geraldine G. Adkins
D. L. Dowery

The Rule regarding separation of witnesses was not invoked by agreement of the parties except to the extent that witnesses prior to their testimony could not be present in Court.

Plaintiff then proceeded to present its proof, which was completed on June 18, 1970, Court having also been in session on June 3, 4, 5, 8, 11, 12, 15, 16, and 17, 1970.

In chambers, at the conclusion of plaintiff's proof, defendants moved for a directed verdict, which motion was overruled.

Upon reconvening on June 19, 1970, defendants resumed presentation of their proof, having, by agreement, put three of their witnesses on stand during course of plaintiff's proof. Defendants' proof was completed on June 23, 1970, Court having also been in session on June 22, 1970. On

June 22, one rebuttal witness was put on stand by plaintiff, the order of proof having been waived by agreement.

In chambers, on June 25, 1970, the plaintiff moved for a directed verdict on the issues of liability; first, as to the issue of per se illegality of the tie-in arrangement in question, and, secondly, for directed verdict on the issue of existence of conspiracy in violation of the Sherman Act, both of which motions were sustained by the Court, the only submissible issues for the jury being the cause and the amount of plaintiff's damage.

Also in chambers on June 25, 1970, the defendants renewed their motion for a directed verdict at the conclusion of all the proof, which motions were overruled.

Upon reconvening on June 29, 1970, the Court advised the jury of directed verdict granted plaintiff on the issues of liability on June 25, 1970, and jury verdict as follows was signed in open court by Marion E. Johnson, as foreman, pursuant to the direction of the Court:

> "We, the Jury, pursuant to the direction of the Court, find for the plaintiff on the issues of liability under the provisions of the antitrust laws applicable to this case.
>
> /s/ Martion E. Johnson,
> Foreman"

June 29, 1970

The jury was further advised by the Court that the only issues left for their consideration were whether defendant's actions caused plaintiff damage and, if so, the amount of the damage, and, for that reason, arguments of counsel would be limited to those issues.

Arguments of counsel were given, and the jury was instructed by the Court as to the law and evidence of the case.



The jury retired to the jury room for deliberation at 3:30 p.m., at which time the two alternate jurors were dismissed by the Court. At 5:30 p.m. the jury was allowed to break deliberation for dinner and resumed same at 7:00 p.m. Upon resuming of jury deliberation, the Court received the following note from Juror Hubrich:

> "Judge Gordon
>
> If it would not be out of order, would it be possible for you to read to the jury, your statements as you did before we went to the jury room; We have a hang up and I believe this might clear the air.
>
> /s/ Mr. Hubrich"

In chambers, counsel was advised of the jury's request. Counsel having no objections, Court reconvened for the rereading of instructions, and the jury again retired at 7:20 p.m., returning into open court at 9:00 p.m. with the announcement that no verdict had yet been reached.

At 9:30 a.m. on June 30, 1970, deliberation was again resumed, counsel having waived roll call of the jury. At 11:45 a.m., the jury returned with the following verdict, which was read by the Clerk into open court:

> "We, the Jury, find for the plaintiff on the issue of damages and award it the sum of $93,200.00.
>
> /s/ Leroy J. Hubrich,
> Foreman"

June 30, 1970

The jury was then dismissed and Court adjourned.

June 30, 1970

/s/ James F. Gordon
United States Distirct Judge

**MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT**—Filed July 7, 1970.

The defendants and each of them, by counsel, move the court to set aside the jury's verdict heretofore returned and to enter a judgment dismissing the complaint notwithstanding the jury's verdict, in accordance with their motions for a directed verdict made at the close of all the evidence.

Carl Arthur Henlein

Albert F. Reutlinger
Attorneys for Defendants
501 South Second Street
Louisville, Kentucky 40202
584-1135

**MOTION FOR A NEW TRIAL**—Filed July 7, 1970.

The defendants and each of them, should the Court overrule their motion for a judgment notwithstanding the verdict heretofore made, move the Court for a new trial on the following grounds:

1. The court erred in overruling defendants' motions for a directed verdict made at the conclusion of plaintiff's proof and at the conclusion of all the evidence.

2. The court erred in directing a verdict on the issue of liability in favor of the plaintiff.

3. The court erred in refusing to admit evidence tendered by the defendants during the course of the trial.

4. The court erred in admitting evidence offered by the plaintiff over the objection of the defendants during the course of the trial.



*Motion for a New Trial*

5. The court erred in instructing the jury in certain respects, to which the defendants and each of them made timely objection.

Carl Arthur Henlein

Albert F. Reutlinger
Attorneys for Defendants
501 South Second Street
Louisville, Kentucky 40202
584-1135

**ORDER**—Entered August 31, 1970.

The Court having considered defendants' motion for judgment notwithstanding the verdict and motion for a new trial, and being duly and sufficiently advised, it is hereby ordered that each of said motions be and the same is hereby overruled.

August 31, 1907

/s/ James F. Gordon
United States District Judge

Copies to all counsel

**JUDGMENT**—Filed November 23, 1970.

The within action having come on for trial commencing on June 1, 1970, and the jury having returned its verdict in favor of the plaintiff in the sum of $93,200.00 on June 30, 1970, and this matter having come on for a hearing on plaintiff's Motion for the award of counsel fees and the taxing of costs on September 18, 1970, and the Court having decided the amount of counsel fees and costs at said hearing and counsel for defendants having requested postponement

of entry of Judgment until a later date in order to have adequate time for preparation of the record for an appeal, and having acknowledged that interest on the Judgment if it is due should run from September 18, 1970, and the Court being sufficiently advised,

It is hereby ordered and adjudged that the plaintiff, Fortner Enterprises, Inc., have judgment against the defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, in the sum of treble $93,200.00, or a total of $279,600.00, with interest thereon at the rate of 6% per annum from September 18, 1970, until paid.

It is further ordered and adjudged that the plaintiff, Fortner Enterprises, Inc., have Judgment against the defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation, jointly and severally, for reasonable attorneys' fees in the amount of $140,000.00 with interest thereon at the rate of 6% per annum from September 18, 1970 until paid.

It is further ordered and adjudged that the plaintiff, Fortner Enterprises, Inc., have Judgment against the defendants, United States Steel Corporation and U. S. Steel Homes Credit Corporation jointly and severally, for its proper assessable costs in the amount of $7,416.75 with interest thereon at the rate of 6% per annum from September 18, 1970, until paid.

It is further ordered and adjudged that this is a final Judgment, there being no just cause for delay.

---

James F. Gordon
United States District Judge

Dated:

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**TRANSCRIPT OF PROCEEDINGS**
**VOLUME II**

# UNITED STATES DISTRICT COURT

**WESTERN DISTRICT OF KENTUCKY**
**AT LOUISVILLE**

Civil Action No. 4392

---

Fortner Enterprises, Inc., - - - - Plaintiff,

v.

United States Steel Corporation, and
U. S. Steel Homes Credit Corporation, - Defendants.

---

APPEARANCES:

For Plaintiff: Kenneth L. Anderson, Esq., 1805 Ky. Home Life Bldg., A. Scott Hamilton, Jr., Esq., 310 W. Liberty Street, Louisville, Kentucky.

For Defendants: Albert F. Reutlinger, Esq., 501 S. Second Street, Carl A. Henlein, Esq., 501 S. Second Street, Louisville, Kentucky.

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Wednesday, June 3, 1970, With a Jury.

• • • • • • •

**(Vol. II, p. 97)**

The case is an antitrust case, as you know. As I view it, and I wish I were better versed in this aspect of the law,

but as I view it, it has two essential parts.

It has the tie-in aspect of the antitrust

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contract. It is true, of course it's true that the Credit Corporation loaned the Fortner Corporation money on the condition that it buy products of its subsidiary or affiliate corporation and it is true and will be brought to your attention that we are not in the general money lending business.

We lent money to promote our products, and it is true we required the products to be bought with the money we loaned; there is a tie-in.

I hope and believe that His Honor, at the conclusion of the trial, will also instruct you that even though—remember, you have to overcome this hurdle first—even though you find there was an antitrust violation, now remember, every contract ties somebody up, but every contract is not in violation of the law.

* * * * * * *



## TRANSCRIPT OF PROCEEDINGS
## VOLUME III

(Vol. III, p. 3)

By the Court: All right; you may call your first witness.

Mr. Anderson: Call Mr. Fortner.

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Mr. A. B. FORTNER, called as a witness, by the plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination by Mr. Anderson.

Q. Mr. Fortner, would you give us your full

(Vol. III, p. 4)

name, please?

A. A. B. Fortner, Jr.

Q. And what is your home address?

A. 2219 South Park Road.

Q. What is your age, sir?

A. Fifty-five.

Q. The plaintiff in this case is Fortner Enterprises, Incorporated; do you have any position with that company at the present time?

A. President.

Q. And how long have you been its president?

A. Since about '58 or '59.

Q. All right, sir; now, for the benefit of the jury—may I pull this around here (Indicating)—the jury has your name and the name of the plaintiff company, in writing here, it is Fortner (Spelling) F-o-r-t-n-e-r?

A. Yes, sir.

Q. And the plaintiff company is Fortner Enterprises, Incorporated?

A. (Witness nodded head affirmatively).

*Testimony of Mr. A. B. Fortner, Jr.*

Q. All right, sir. Mr. Fortner, what has been the general line of your occupation or business over the years?

(Vol. III, p. 5)

A. For thirty years I have been building and selling real estate and managing a real estate office.

Q. In 1960, uh, would you please tell us with what corporations you were associated and in which you owned stock?

A. Zettwoch-Fortner Enterprises, Fortner Homes, and Iroquois Development.

Q. All right, sir; what period of time have you been connected with the Zettwoch-Fortner?

A. I went with Zettwoch & Company in, uh, 1940—1939 or '40 and then, uh, in 1944 the name was changed to Zettwoch-Fortner Corporation and I have been with them since that time.

Q. What type of business is the Zettwoch-Fortner Realty Company in?

A. Selling real estate, insurance and building homes, apartments.

Q. Now, you indicated that, uh, you were associated with Fortner Homes in 1960; what was the function of that corporation?

A. Building homes.

Q. And how long had that corporation been in existence, just to your best recollection?

(Vol. III, p. 6)

A. I believe about '49, '50, somewhere in there.

Q. 1949?

A. Or '50, yes.

Q. All right, sir; now, I forgot to ask you, uh, do you own stock in the Zettwoch-Fortner corporation?

A. A hundred percent of it—all of it.

Q. What about Fortner Homes?



*Testimony of Mr. A. B. Fortner, Jr.*

A. All of it.

Q. Uh, what about Fortner Enterprises?

A. All of it.

Q. What business was Iroquois Developers in in 1960, sir?

A. Subdividing and building homes—subdividing.

Q. And about how long had that corporation been in existence?

A. I believe that was about 1952, '53, four, somewhere along there.

Q. All right; in 1960 did you own any stock in Iroquois Developers?

A. Yes.

Q. How much stock did you own?

(Vol. III, p. 7)

A. Fifty percent.

Q. All right. Mr. Fortner, prior to 1960, let us say, how much experience had you had personally in the building of residential houses?

A. I had built probably better than seventy—seventy, eighty, ninety, somewhere in there, plus we had been connected with hundreds and hundreds of building homes and selling 'em for builders.

Q. Well, when you say that you had been connected, uh, what do you mean by that?

A. Well, we will take a subdivision like Valley Gardens, for instance; had five hundred nineteen lots and, uh, that was a New York builder. We sold him the ground and took him through all of the planning and zoning and helped him in his financing and made the sales and handled the insurance—five hundred nineteen of them; they were built in a year.

Q. And was that before or after 1960 that that particular one occurred?

A. Before.

Q. Had you been involved through any of the corporations which you have identified in the development of, uh, real estate for use as residential lots?

A. Yes.

(Vol. III, p. 8)

Q. How many subdivisions, approximately, had you been involved in in that development?

A. That we owned outright?

Q. Well, that you owned outright or that you assisted someone else in, either way?

A. Twelve or fifteen.

Q. About how many lots would they involve altogether?

A. Several thousand.

Q. What was the size of the sales force of Zettwoch-Fortner in 1960?

A. It was between twenty and twenty-five salesmen; I don't remember exactly.

Q. Do you know, uh, how that compared with any of the other larger real estate companies in the Louisville and Jefferson County area at that time?

A. We were one of the largest companies.

Q. All right. Would you please tell the jury when the Golden Meadows subdivision, uh, or approximately when the Golden Meadows subdivision was first opened?

A. Somewhere around '57.

Q. All right. Now, if the Court please, I made a mistake here and started out writing with my

(Vol. III, p. 9)

black pencil on this thing. Is that all right or should I start off with the Court's designated color?

By the Court: Well, I don't believe we have black; is there a black?



Mr. Anderson: There's a blue and a green.

Mr. Reutlinger: There are two down there, Judge.

Mr. Anderson: I really think the Court's pencils are going to be easier to read.

By the Court: Yes.

Mr. Anderson: I will tear that off.

By the Court: All right.

Q. Now, Mr. Fortner, at the time Golden Meadows subdivision was opened, uh, how many lots were planned for the subdivision?

A. Forty-seven; they had, uh, forty-seven.

Q. Who owned Golden Meadows at the time it was first started in about 1957?

A. Iroquois Development.

Q. And I think you have already told us that you owned fifty percent of the stock of Iroquois

(Vol. III, p. 10)

Developers?

A. That's right.

Q. And did you start out owning fifty percent of the stock of that corporation?

A. Yes.

Q. Now, who owned the rest of the stock of Iroquois Developers?

A. W. B. Robards; he's an engineer.

Q. Now, when Golden Meadows was opened in 1957 what was the process of getting the subdivision started? How did you go about it?

A. Well, we advertised the lots for sale. We built a few homes in this, uh, general promotion.

Q. Well, when the subdivision was opened was it, uh, completely developed?

A. No.

Q. Was it partially developed?

A. Yes.

Q. All right. Well, what procedure did you go about as far as Golden Meadows was concerned as to the development of the subdivision?

A. Well, we bought the ground and then we developed some and then we sold some and took in some of that money and developed some more and kept on

(Vol. III, p. 11)

trying to sell and, as we developed, then we would sell—it's a large subdivision.

Q. Well, did you develop this in sections?

A. Yes, sir.

Q. All right. You mentioned that, uh, you built some houses in the subdivision. Did you personally—were you personally involved in building any houses in Golden Meadows subdivision?

A. Yeah, we built a very few for us personally, with Mr. Smith, in my office, we built three or four, five—three or four, I don't remember exactly, and then, uh, we started off with Mr. Miles on a couple of 'em and then he went on his own and, uh, I can't remember right offhand any more.

Q. All right. Prior to October, 1960, can you give the jury some idea of some of the builders who had purchased lots in Iroquois Developers and built in Golden Meadows?

A. Mr. Senn was one of the men that we bought part of Golden Meadows from. We bought it from two or three different owners and Mr. Senn built several houses in there and Mr. Clyde—I believe Clyde Simpson built a few and Mr. King built—built some and Mr. Miles, Herman Miles built quite a few,

(Vol. III, p. 12)

thirty, forty, somewhere in that neighborhood, and Mr. John Walzer built 87 prefabricated houses in the subdivision.



Q. Do you know what kind of houses those were that Mr. Walzer built?

A. Empire Homes.

Q. Were those Empire Homes built by Mr. Walzer before October of 1960?

A. Yes.

Q. Now, what was the first information that you had concerning the Homes Division of United States Steel Corporation as to whether or not any building materials or prefabricated houses or anything of that nature being for sale?

A. When did I first hear of it?

Q. Yes.

A. I believe the first I heard was in—or, read, was in some of the magazines such as House and Home—just that they were building prefabricated houses, located just across the river.

Q. What was the first contact that you had personally with anyone from the Homes Division of the United States Steel Corporation?

A. When was it?

(Vol. III, p. 13)

Q. No, sir; uh, well, when was it—what was it—who was it?

A. First, uh, contact that I had with the Homes Division was with Mr. Neal Day in approximately October or November, December, uh, of 1959.

Q. How did that contact come about?

A. Through a Mr. Edmondson, which was a saleman in my office.

Q. Well, uh, did you contact United States Steel Corporation or did they contact you or just how did the initial contact come about, Mr. Fortner?

A. Mr. Edmondson, uh, met a friend of his going back

and forwards, some way from Nashville, Tennessee, and this friend was telling him that he was building U. S. Steel packages or getting ready to or something of that nature and they had, uh, offered him some unusually good financing and, uh, he was telling me about this and he said—knew that I had these lots in Golden Meadows and was wondering if I'd be interested in building U. S. Steel homes on 'em and I said, "Well, another deal; I'll be glad to talk about it", and so I believe that Mr. Edmondson talked to Mr. Day—talked to Mr. Day and either Mr. Edmondson set up the appointment or Mr. Day called me;

**(Vol. III, p. 14)**

I don't recall.

Q. All right; and did you then have a meeting with Mr. Day?

A. Yes, sir.

Q. Where did that meeting take place?

A. In my office on Third Street.

Q. What was discussed at that first meeting?

A. Oh, just everything in general. He was telling me about his package and how quickly he could deliver; how easy they were to put together and that they could offer us some financing if we needed it and just—we talked in general.

Q. Were there further meetings following that initial meeting?

A. Lots of 'em.

Q. Did you subsequent to the first meeting, uh, at some point have a meeting with representatives of the Credit Corporation of United States Steel—uh, I'm sorry; where U. S. Steel Homes Credit Corporation representatives were involved?

A. Yes, sir.

Q. Who were these representatives?



A. Well, we had the meeting with Mr. Dick Dyas, and we had meetings with Mr. Rollins.

**(Vol. III, p. 15)**

Q. That is Mr. Rollins who is here in the courtroom?

A. Yes, yes, sir.

Q. And what was the result of those meetings with the representatives of the Credit Corporation?

A. Well, they, uh, Mr. Day and I believe Mr. Black had set out what he thought that the Credit Corporation would do and, uh, I guess he brought them along to verify it and they come along to see if they liked my plan also, I imagine.

Q. Well, did they—did they verify what the Homes Division people had said that they thought they would do?

A. Yes.

Q. And what offers of financing were made then?

A. Well, we made offers backward and forward to each other until, uh, I asked 'em for a certain amount which, uh, if we could of got was real good to go on with the deal and get it over with.

Mr. Reutlinger: I cannot hear the witness, Judge.

By the Court: Speak louder,

**(Vol. III, p. 16)**

please.

The Witness: Yes, sir; where we could start another project and so, when they come to our terms, why, we told 'em we would make a deal if we could and they agreed to do it.

Q. Well, now, the financing that you have mentioned, uh, what was that financing for in the course of these discussions?

A. The financing was to, uh, buy—the financing was to develop the unimproved property and to build homes.

Q. And was any of the financing for the acquisition of the land?

A. Yeah, fifty percent of it, yes.

Q. What do you mean fifty percent of it?

A. Well, I had a partner in Iroquois Developers and we had talked with U. S. Steel and we wanted to do this on our own, Fortner Enterprise, and we had to buy him out, so, for Fortner Enterprise to acquire all of it.

Q. Well, in order to buy him out did Fortner Enterprises have to buy the land from Iroquois Developers?

A. Yes.

**(Vol. III, p. 17)**

Q. Now, in terms of, uh, financing that was offered in the course of these initial negotiations what did that represent in relation to what it would cost to buy the land from Iroquois Developers?

A. I don't believe I follow you.

By the Court: I—I didn't understand that.

Mr. Anderson: He said he didn't follow my question, Your Honor.

By the Court: Oh, all right.

Q. What I'm trying to find out, Mr. Fortner, is, uh, what offers were made by the Credit Corporation to the Fortner Enterprises and you as its president for financing to allow Fortner Enterprises to buy the land from Iroquois Developers? Was it half the value of the land, a hundred percent of it, uh, a fifth of it?

A. A hundred percent.

Q. All right.

Mr. Reutlinger: Judge: I believe that is a little leading, but let's let it go for a little while.

By the Court: All right.

Q. What about the development money? How



**(Vol. III, p. 18)**

much of the development money were you offered?

A. All of it. A hundred percent.

Q. Uh, were you also offered any money insofar as construction money was concerned?

A. Yes.

Q. And how much of that in relation to the cost of construction?

A. It all amounted to—we could get all we need, the hundred percent to make the deal.

Q. All right. After you had had these discussions, had you—would you tell us w[illegible]her or not you had reached an agreement—an agreement in principle with the Credit Corporation on the financing?

A. Yes.

Q. What happened then?

A. Well, we were getting ready to close our deal, or talk about closing it or—

Q. (Interrupting) Well, after you reached agreement in principle what happened after that?

A. Well, it—I understand; we—I tried to buy my partner out.

Q. What do you mean by that? The jury doesn't understand the mechanics of your organization, Mr. Fortner. You have got to make them understand.

**(Vol. III, p. 19)**

A. I had a partner in Iroquois Developers that I had to buy his half of the stock before I could transfer it or sell it to—or borrow on it from U. S. Steel Credit Corporation and, uh, well, we just talked about buying and my partner didn't agree and he decided he wanted to go into business himself.

So, then I agreed to—uh, he wanted to take the deal, you see, with U. S. Steel. He thought maybe my end was bet-

ter or something, I guess, and so I said, "Well, all right; you buy my stock in Iroquois Developers and you can go ahead with the deal."

So, several months went by. I don't know exactly what happened in the meantime between him and U. S. Steel, but for unknown reasons, U. S. Steel and he didn't make a deal and so I—when their deal fell through, why, my partner in Iroquois Developers come by and he said he couldn't deal with U. S. Steel and wanted to know if I was still interested in going through with the original deal and I said, "Well, I don't know whether U. S. Steel is interested or not, but I'll see."

This was getting along up in maybe August or sometime of '60 and, uh, so I contacted Mr. Day and Mr. Day said yes, that he thought that they were still

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interested and he said, "if you will write a letter to me—", uh, I believe it was to him or Mr. Black, I forget which, said, "Yes, we will reopen the case," and Mr. Day even went further; he wrote the letter for me and I just signed it and, uh, that started the deal over again.

Q. Now, before these negotiations had come to a halt because of Mr. Robards' interest in this project, what had you been told by Mr. Day and others from the Homes Division about the U. S. Steel package, prefabricated house package?

A. Well, of course, they did a selling job. They told us that, uh, this was built by U. S. Steel, so to speak, and backed up by them and that it was a real good package and they told us about different places in the United States where they sold some to the government and different ones and that it was just an excellent package to put together and we could make up our momentum in it by putting 'em up so fast and they would sell fast if we would keep our



prices in line and we were taken over to their plant where—where we had a meeting over there and they showed us slides and different things about the houses and we were just generally sold, without checking around any—

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to any of the places where they were building 'em, that they were good houses and you would just think, uh, a multibillion—multimillion dollar corporation, or billions, why, you just didn't check too far.

Q. Now, were any statements made about the erection of the houses and the time that it would take to erect them?

A. Well, we were told that they would—could be put under roof in a day from the time that they were delivered; they could be put under roof in a day.

Q. Were there any statements made about how long it would take to complete the house ready for occupancy?

A. From the time that they was ordered to the time that, uh—it was thirty days.

Q. In the course of your negotiations with the Credit Corporation on the financial aspects of this initial transaction, were there any discussions about the time, length of the loans?

A. Yes, uh, both the Homes Division and the Credit Corporation tried to get us to sign up and say that we would build these two hundred or hundred and eighty-seven it was at the time, uh, in a year and

(Vol. III, p. 22)

they showed us all of the ways it could be done and computed it out and so we decided just to be on the safe side that we would make the loan for two years to be sure, hoping we could do it in a year; this was the way the money was in the deal by the volume and the time.

Q. Mr. Fortner, this, uh, did you—well, you have told

us that you had a discussion with Mr. Day about reopening this after Mr. Robards' deal fell by the wayside?

A. That's right.

Q. Were the negotiations then reopened?

A. Yes.

Q. And did they result in the signing of any papers?

A. Yes.

Q. I'll show you a copy, or, actually show you plaintiff's Exhibit No. 5 and ask you if you can identify that, sir?

(At this point the witness examined the document above referred to)

By the Court: You can rely

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on the fact he isn't going to hand you the wrong thing, Mr. Fortner.

Mr. Reutlinger: I don't blame you, Mr. Fortner.

The Witness: Well, all right, yes.

Mr. Reutlinger: Be very careful.

Q. What is that, sir?

A. It's a loan agreement.

Q. Are there any attachments to it?

A. Yes.

Q. Well, what are they?

A. They are the mortgage and some notes.

Q. All right; are these all of the papers that comprise the arrangement with the Credit Corporation in October of 1960?

A. Uh, yes.

Q. What is the date of that document?

A. 28th day of October, 1960.

Q. Would you read the first paragraph, please, sir?

A. (Reading)

"This agreement, made this



(Vol. III, p. 24)

28th day of October, 1960, by and between Fortner Enterprises, Inc., a corporation organized and existing under and by virtue of the laws of the State of Kentucky, hereinafter called the 'Borrower', and United States Steel Homes Credit Corporation, a corporation organized and existing under and by virture of the laws of the State of Delaware, having an office in New Albany, Indiana, hereinafter called the 'Lender'—

Q. (Interrupting) All right. Would you read this one line numbered "2", and then read paragraph (b) under that, sir; read it loud and clear and slowly, Mr. Fortner, if you will.

A. (Reading)

"The Borrower agrees to do and perform the following acts and things:

"To complete the development of the premises and to erect

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on each of said lots, free from all mechanic's liens, a prefabricated dwelling house manufactured by United States Steel Homes Division, United States Steel Corporation, hereinafter called the 'Dwelling House', and to construct and install said improvements and to construct said Dwelling Houses strictly in accordance with the development contracts and—"

Q. (Interrupting) That's sufficient for purposes here, Mr. Fortner.

Now, take this Exhibit, if you will, and I will ask you if plaintiff's Exhibit No. 56, which I am holding in my hand, is an exact copy of the first three paragraphs of that loan agreement which is plaintiff's Exhibit—

By the Court: Five.

Q. (Continuing)—plaintiff's Exhibit 5?

A. Yes.

Mr. Anderson: All right; if I may, I would like to offer, Court please, both

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plaintiff's Exhibit No. 5 and plaintiff's Exhibit No. 56 into evidence.

By the Court: No objection?

Mr. Reutlinger: No, Your Honor.

By the Court: So ordered.

(Whereupon, at this point Plaintiff's Exhibit Nos. 5 and 56 were received in evidence)

Mr. Reutlinger: The witness said that they were the same. I am sure they are.

Mr. Anderson: If I may exhibit this to the jury now, Your Honor. (Doing so at this point).

Q. Now, Mr. Fortner, I'll refer you to paragraph "2-b" of plaintiff's Exhibit No. 5, which is what you just read, and I'll show you plaintiff's Exhibit No. 57 and ask you if this plaintiff's Exhibit No. 57 is an accurate copy of the portion of plaintiff's Exhibit No. 5 which you have just read?

A. Yes.

Mr. Anderson: And we will

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offer plaintiff's Exhibit No. 57 into evidence, Your Honor.

By the Court: All right. Now, any member of the jury that would like to read those placards during the recess, of course, will be permitted to do so.

Q. Mr. Fortner, prior to the signing of this loan agreement which has been identified as plaintiff's Exhibit No. 5, did the question of the requirements that the prefabricated house packages being in the loan agreement come up?

A. Yes.





Q. What were you told?

A. We were told that, uh, if we built the houses, we could borrow the money and if we borrowed their money, we had to build the houses.

Q. Now, sir, this hundred percent financing for the land acquisition and development which you have told us about—strike that.

Being in the real estate business and development business were you familiar with source of financing, uh, in particular, in the Louisville and Jefferson County area in 1960?

A. Yes.

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Q. The one hundred percent financing for land acquisition and development which was offered by the Credit Corporation, as you have told us about, was that available, to your knowledge, in 1960 from any other conventional or normal lending source?

A. Nowhere, to my knowledge.

Q. If you had not signed this loan agreement which is plaintiff's Exhibit No. 5, what would have happened to Golden Meadows subdivision and the lots that are the subject matter of plaintiff's Exhibit No. 5?

Mr. Reutlinger: Judge, I think that is a little speculative; what would have happened had he not signed a piece of paper; he could say perhaps, what he intended to do had he not gone into this transaction, but I—

Q. Well, all right, that.

By the Court: Yes, I'll sustain the objection to that.

Mr. Reutlinger: I would rather have it couched in the phrase of an intent, not a speculation.

Mr. Anderson: That's fine; I'll be happy to change the question.

*Testimony of Mr. A. B. Fortner, Jr.*

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Q. What did you intend to do with the lots that are the subject matter of this, uh, loan agreement if the loan agreement with the Credit Corporation with United States Steel had not been signed?

A. We, I assume, would have just kept on doing like we were doing, building and promoting lots and selling lots like we had in the past on all our subdivisions.

Q. All right; would Iroquois Developers have continued this or would it have been Fortner Enterprises?

A. Iroquois Developers.

Q. Now, after the loan agreement and the mortgage and the note which are all plaintiff's Exhibit No. 5 were signed, did you receive the money to use to acquire the land?

A. Yes.

Q. And did Fortner Enterprises acquire the land?

A. Yes.

Q. And what was done after that?

A. Well, when we acquired the land we started immediately preparing our models and getting ready for a grand opening.

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Q. This land that was acquired from Iroquois Developers, was it all developed or was part of it undeveloped?

A. Part of it was undeveloped.

Q. And as to the undeveloped land, did you do anything about that after—

A. (Interrupting) Immediately, we started building lots, letting contracts for building roads, putting in water and gas.

Q. All right. Now, how many models did you order?

A. Five.

Q. Were all five of these models built?



*Testimony of Mr. A. B. Fortner, Jr.*

A. Yes.

Q. Uh, did you encounter any problems or difficulties with the models?

A. Yes, we had trouble—trouble from the first model.

Q. Trouble from the first model?

A. We had trouble from the first model. It was an L-shaped house and we started having trouble which we figured just because our men was kind of new at this particular type of—

Mr. Reutlinger: (Interrupting)

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I can't hear the witness; you say your men were new?

A. I said that the men were bound to be new on building U. S. Steel homes; they'd never built a U. S. Steel home.

Mr. Reutlinger: Yes. I have had trouble hearing.

The Witness: So, we figured it might be that. So, we called over the factory men and then when they got over there and it took them seven days just to put the roof on and they ended up by cutting the roof to a conventional then instead of prefab and when they got the roof up, why, the trusses all fell—or, not fell, but they sagged quite a bit.

Q. Well, now, Mr. Fortner, at least some of the members of the jury are not builders and not familiar with building. They may not know what you mean when you talk about not being able to get the roof up. Would you explain that?

A. Yes, this, uh, roof would have plywood on the top of it that it was supposed to be fit, cut to fit in the factory and when they put it up on the trusses, why, it just didn't fit and the trusses, uh, is the part that holds up the roof and the shingles

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over the plywood and the shingles and the trusses sagged and they said something about it being a new model and

they had to do some more work on it or something and each time these things would happen, why, we were assured that it would just be straightened out.

They were very nice and we got all of the promises in the world, but seemed like nothing ever got straightened out; this was the thing that was the trouble.

Q. Did you get your models completed?

A. We got our models up, yes.

Q. And then how did you go about starting the sale of the houses where the United States Steel packages were involved?

A. We started advertising before the opening, announcing we were going to have an opening and when it was and we decorated all of the models, very thorough, and wall papered some of 'em and with wall to wall carpeting and very fine furniture. When we got 'em all trimmed out, why, they was beautiful models.

We had our grand opening. We ran a couple page ad in the paper and had hundreds and hundreds of people there and had the officers there to help with the traffic and had twenty some-odd salesmen there and

**(Vol. III, p. 33)**

had several giveaways, such as a color TV and things to help draw the crowd.

The U. S. Steel people was there. The Homes Division, that was, and said they was very happy with the opening and that was about it, through the opening.

Q. All right, sir; first of all, Mr. Fortner, I'd like to show you plaintiff's Exhibit 9 and 9-A and ask you if you can tell us what those are and approximately when they were taken?

A. Strictly be a guess; it would be about the latter part of '61.

Q. All right; what do they depict?



A. I beg your pardon?

Q. What do they show?

A. They show a picture of the subdivision and it shows the houses that's been built in the subdivision. It shows the vacant ground that's not been developed or built on.

Q. By these subdivisions, you mean Golden Meadows?

A. Yes.

Q. Are both photographs of Golden Meadows?

A. Yes.

Mr. Anderson: We will offer

**(Vol. III, p. 34)**

these in evidence, Your Honor.

The Witness: This five hundred nineteen I was talking about was right here in it. I didn't know it was in this picture, but there it is.

Q. What portion of the photograph; the jury can't see it when you hold it down like that. Well, first we ought to get it in evidence. We offer these into evidence, if the Court please.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 9 and 9-A were received in evidence at this point.)

Q. Now, hold them up, Mr. Fortner, and maybe you should stand up and hold them up and point—don't get in too far; that's far enough, and point to the section, and that was something to do with Valley Gardens, I think you mentioned?

A. Point to which, now?

Q. Well, uh, first of all, show the jury where Golden Meadows is and then point—then show the jury the other subdivision that you have told us

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about earlier.

A. This (Indicating) is Golden Meadows up here. It

stops right here (Indicating), and right here and around up back up here and up here and over here and around (Indicating).

By the Court: A little louder.

The Witness: I was just saying around and around here (Indicating) where the boundary is. This (Indicating) is the one I was talking about earlier, the five hundred nineteen that we had up here (Indicating).

Q. What was the name of that, Mr. Fortner?

A. Valley Gardens.

Mr. Anderson: May I pass these among the jury, Your Honor?

By the Court: Yes, sir. Ladies and gentlemen; we have been going an hour and we will take a ten minute recess and remember the admonitions of the Court and be back in your seats in ten minutes and you may examine these photographs during the recess.

(Whereupon, at about the hour of 10:25 A.M., a recess was taken, reconvening at about

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the hour of 10:40 A.M., and the following proceedings occurred.)

Q. Going back to plaintiff's Exhibit No. 5, Mr. Fortner, the loan agreement and referring to the last page of that agreement, paragraph D-1, and I'll ask you to look at it.

(Thereupon, the witness did as requested.)

Q. And I show you plaintiff's Exhibit No. 58 and ask you if this is a true and correct copy of the first two sentences of paragraph D-1 of plaintiff's Exhibit No. 5?

A. Yes, it is.

Mr. Anderson: We offer plaintiff's Exhibit No. 58 into evidence, Your Honor.

By the Court: All right.



(Whereupon, Plaintiff's Exhibit No. 58 was received in Evidence.)

Mr. Anderson: If I may exhibit it to the jury. (Doing so).

Q. Mr. Fortner, at the time the October 28,

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1960, loan agreement was signed would Fortner Enterprises have purchased the prefabricated house packages manufactured by the United States Steel Corporation without the financing offered by and made available in that loan agreement?

A. No, we would not. We would have stuck with some of the others that we was already having good success with. This Empire Homes, we had built eighty-seven of 'em, or Mr. Walzer had, and we handled them for him without any trouble whatsoever, but they didn't have any financing like that.

Q. When you say that you handled the eighty-seven homes for Mr. Walzer, what do you mean by that, sir?

A. We sold him the ground and, uh, we helped him with his financing and we handled the sales for him.

Q. What company handled the sales?

A. Zettwoch-Fortner Corporation.

Q. All right. Now, before we recessed you had just told us about the grand opening. Would you tell us when the grand opening for this particular project, the United States Steel project took place?

A. It's the latter part of March in, uh,

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'61.

Q. Mr. Fortner, I show you plaintiff's Exhibit No. 14 and 14-A through 14-Q and ask you if you can identify those, please.

(Whereupon, the witness examined the exhibits just referred to.)

A. Yes.

Q. Tell the jury if you would what they represent?

A. These were pictures taken at our opening that we opened the subdivision, had the grand opening and, uh, why, these pictures was taken all during the opening.

Q. All right; let's start with the first one you've got.

A. I've got 'em mixed up now.

Q. Find No. 14 and let's take them—

A. (Interrupting) Fourteen; all right.

Q. What does plaintiff's Exhibit No. 14 show and hold it up so the jury can see it?

A. That shows the front of one of our models and it shows—I see a few of the sales people standing there in front of it and customers.

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Q. All right; what does 14-A show?

A. 14-A shows a picture of our first model built; the one we had all the trouble with the roof and the trusses and what have you.

Q. All right; that was after all the things had been corrected, I take it?

A. Yes.

Q. Go ahead; what is 14-B?

A. 14-B?

Q. B.

A. 14-B shows a part of one of our parking lots and shows how full of cars it was and it shows some of our station wagons there with our name on it and in the background is one of the models.

Q. All right.

A. 14-C?

Q. Yes, sir.

A. 14-C shows a picture of one of the models; that's the small one.

Q. Now, rather than going through each one of these,



Mr. Fortner, do these fairly represent the models at the opening and, uh, some of them show the crowds and things of that nature?

A. Yeah. Here's a picture of the interior

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of one of 'em; very nice.

Q. All right; is that the way the model was at the time of the grand opening?

A. That's right.

Q. In March of 1961?

A. That's right.

Mr. Anderson: If the Court please, we would offer all of these photographs as plaintiff's Exhibit No. 14 and 14-A through 14-Q into evidence.

By the Court: All right; let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 14, 14-A through 14-Q were received in evidence at this point.)

The Witness: There is a picture of the officers out there directing the traffic.

Q. All right; what Exhibit is that, sir?

A. 14-M.

Q. Fine; let me if I may pass those.

A. And here is Miss Louisville shaking

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hands with me.

Q. All right; what Exhibit is that, sir?

A. When I am nice and skinny; it's 14-N.

Mr. Anderson: If we may circulate these to the jury, Your Honor.

By the Court: You can put them over on the rail and the jury may examine them when they come back from lunch.

Mr. Anderson: All right, sir.

Q. Now, Mr. Fortner, I hand you another group of photographs which have been identified as plaintiff's Ex-

hibits 15 through 15-XX, I believe it is. Would you go through those, quickly, and tell us what they are.

A. This is a picture of the model—this is a picture of the living room in a model.

Q. Well, when were those taken?

A. All taken at the opening.

Mr. Anderson: All right. If the Court please, I don't think we need to go through seriatim identification of these. I would offer all of them into evidence.

By the Court: All right; let

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them be filed and the jury may examine them during the recess when they come back from lunch.

Mr. Anderson: All right.

By the Court: These are all opening day pictures of the various kinds?

Mr. Anderson: Yes.

(Whereupon, Plaintiff's Exhibit Nos. 15 through 15-XX were received in evidence.)

Q. Now, just a reference to one of them here, plaintiff's Exhibit No. 15 itself, what is that, Mr. Fortner?

A. That is the picture of the living room in the first model we built.

Q. As you had it decorated?

A. Exactly, yes.

Q. And did you tell us what type of a crowd you had at the grand opening?

A. We had a real large crowd, hundreds and hundreds of people there.

Q. After the—well, first of all, what was the procedure for selling these prefabricated houses? Did you have houses available for people to

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move in or did they order them on the basis of the models? Just what happened there?



A. No, we had no speculative houses that—we would show 'em the models. They would have to take orders and we would assure 'em possession in about forty to forty-five days—way we started out, pick out the model they wanted and extras they wanted and we had, like, stoves and refrigerators and ranges and different things to offer. They could have what they wanted to, or basement or without basement, but we had the five basic models for 'em to choose and they picked out the model they wanted and the extras they wanted and that governed the price.

Q. All right. What is your definition of a speculative building?

A. Speculative building is where you build a house and it's not sold and you build one or a dozen or two dozen and try to sell them.

Q. Is that the—uh, are you familiar with the use of that term in the industry generally?

A. Yes, we did a lot of it.

Q. Is that, uh, the definition of the term as it is ordinarily used in the industry?

A. That's what I call a speculative build-

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ing is a building that hasn't been sold.

Q. Well, are you familiar as to whether or not that is the general definition of the term in the real estate business?

A. Yes.

Q. Now, how did sales go after the grand opening, Mr. Fortner?

A. They went very good. They went good for a couple of months, a little over, and then it slowed down tremendously.

Q. I will show you what has been marked as plaintiff's Composite Exhibit 47 and ask you if you can identify those, please, sir?

A. Yes, sir.

Q. What are they?

A. These are the contracts that we used on the sale of the houses in the U. S. Steel homes.

Q. All right; what are the pink slips attached to the contracts, Mr. Fortner?

A. They are a copy of the closing statements.

Q. All right. Now, now I would like first of all to refer you to the bottom four there, Mr. Fortner, and you have said that the pink sheets are the closing statements, so I take it that those bottom

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four are closing statements; is that correct?

A. Right.

Q. There are no contracts with those; is that right?

A. Yes.

Q. Do you know what happened to the contracts?

A. I do not.

Q. All right. Now, besides those sales represented by these contracts and the four closing statements, were there any other sales in the subdivision?

A. There was one other that we have lost the closing statement and the contract on.

Q. And to whom was that made?

A. That was made to a Mr. John Cunningham.

Q. All right; what lot was that on?

A. Lot 26; he is—it was one of our models.

Q. All right; and was that one of the original models or a later model built?

A. I believe it was an original model.

Q. All right; and when was that sold?

A. In March of 1962.

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Q. All right, sir; if the Court please, we would offer plaintiff's Composite Exhibit No. 47 into evidence.



By the Court: All right; let it be filed. Can you tell us how many are involved in that?

Mr. Anderson: Yes, sir; I've counted them and there are sixty-four; sixty with contracts and four without contracts and then the one that Mr. Fortner has identified, the Cunningham, making a total of sixty-five.

By the Court: He maintains that this represents sixty-five sales?

Mr. Anderson: Yes, sixty-four plus the testimony about Mr. Cunningham; yes, sir.

(Whereupon, Plaintiff's Composite Exhibit No. 47 was received in evidence.)

Q. How many houses were built, including models in total using the United States Steel prefabricated package, Mr. Fortner?

A. Seventy.

Q. All right; what happened to the other

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five that are not identified here or the one that was sold to Mr. Cunningham?

A. United States Steel taken them back.

Q. In the foreclosure suit?

A. Yes, sold 'em in the foreclosure suit.

Q. Right. Now, Mr. Fortner, can you tell the jury by reference to the contracts or if you have already referred to them, you may have a note on it, how many sales contracts were signed in March of 1961, April and May?

A. Each month separate or together?

Q. Each month separate, sir.

A. March is seven.

Q. All right.

A. April, thirteen, and May, eight.

Q. And what did you tell us the grand opening date was?

A. I think it was March 26.

Q. All right; by reference to the contracts there, can you tell us if any sales were made before the grand opening?

A. I believe four.

Q. And are those included in the seven that you have listed for March of 1961?

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A. Yes.

Q. Now, how many sales were made in June of 1961?

A. Two.

Q. And how about July?

A. Three.

Q. How about August?

A. Six.

Q. How about September?

A. Six.

Q. If my mathematics are correct, that comes to forty-five?

A. Right.

Q. All right, sir. Now, Mr. Fortner, you testified a minute ago that sales were good for the first couple of months, I believe you said. Was that in this period of March, April and May?

A. Well, it was mostly April and May; March was almost already gone at the time of the opening.

Q. All right. Now, after the initial sales were made in March and the first part of April did your men start building houses that had been sold?

A. We ordered them immediately and started,

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yes.

Q. All right; what happened after they started building the houses?



A. Well, that's when we started having our problems. They would be shortages in the trailer when it would come over. A piece of wall panel wouldn't be in or cabinet or sink top or doors would be hung wrong or just any number of things that would be wrong with it by the time we got it.

Then, some you could wait on without delay, but the most of it, wall panel you couldn't go on and finish the wall until that you had all of the pieces and this would delay us a tremendous amount of time.

We would go after it and maybe they would have it ready and maybe they wouldn't and maybe they'd say they would send it over the next day and it might—it might be a week, might be two months; we were just delayed any length of time with it and this is one of the original things that started breaking our back.

Q. Let me digress for a minute here, Mr. Fortner, and ask you what arangements Fortner Enterprises had made to have these houses built? In other words, who was to supervise the building generally? Who was to supervise it on a day to day basis and how

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was it all handled?

A. Mr. Herman Miles, owner of the Cook Lumber Company, was building in the Golden Meadows subdivision at the time and in fact, I got with Mr. Miles and he went over all of the figures and everything before we started these houses.

We made a deal. He was building in Golden Meadows and he was doing a good job. We were selling his homes and weren't having any trouble with his work or anything.

So, I employed him to be the general superintendent on the job to build the homes.

Q. What type of homes had Mr. Miles been building in Golden Meadows before the U. S. Steel transaction?

A. He was building conventional homes.

Q. I forgot to ask you a while ago—you told us that you were involved directly in building a few?

A. A few, yes.

Q. Conventional homes in Golden Meadows. What type of profit did you make on those homes?

Mr. Reutlinger: Note an objection, if Your Honor please; I don't think that

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has any bearing on this case.

Mr. Anderson: Shall we approach the bench, Your Honor?

By the Court: Yes.

(Counsel approach the Bench at this point.)

Mr. Anderson: The same subdivision, the immediate time prior to this and I think it bears on the damages.

By the Court: I think your only issue here is what damage he suffered relative to these Steel homes.

Mr. Anderson: Well, but I think that the other experience in the subdivision—

By the Court: (Interrupting) Well, I'm going to sustain the objection; I don't think it is comparable.

(Counsel return to counsel table at this point.)

Q. What price range of houses had you built in Golden Meadows before the U. S. Steel project?

A. Uh, about $15,000.00.

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Q. And what was the price range of the houses involving the U. S. Steel packages?

A. They varied from ten-something to $14,900.00 or $14,950.00 without any extras.

By the Court: What did you say the sale price was on the conventional type?

Mr. Anderson: $15,000.00.



The Witness: It was a wide variety of conventional prices in the subdivision.

Q. Well, let me ask you one question here; this conventional type house that you built in the subdivision before the U. S. Steel deal, was it comparable to any of the U. S. Steel models that you were selling?

A. In price?

Q. Well, in comparable—for makeup and in price.

A. It was comparable in price and in size.

Mr. Reutlinger: Did he say $15,000.00?

Mr. Anderson: Un-huh.

Q. I don't like to incur the wrath of the Court. I think that gives us sufficient—obviously, I don't want to ask the question again unless—

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By the Court: (Interrupting) Ladies and gentlemen; we are going to take about a five minute recess and the Court wants to hear arguments on a question of law. So, remain available to the call by the Marshall and remember the Court's admonitions.

(At this point an adjournment was taken to chambers of the court and the following proceedings occurred)

Mr. Anderson: If the Court please, I don't want to make a big, hairy issue about it. I had a feeling the Court felt I didn't lay a sufficient foundation when Mr. Reutlinger objected and so I proceeded with these other questions in an attempt to lay a sufficient foundation to show the comparability.

It, of course, is our feeling that when you have got houses being sold immediately prior to our transaction in the same subdivision that are comparable that the amount of profit made on those is, uh, admissible for the jury to hear in considering the damage element.

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By the Court: Well, it is just my judgment, gentlemen, that the issue here is the damage he suffered by the failure of these United States Steel homes to be what he thought they were or what they were purported to be and resulting from the so-called antitrust tie-in and I just can't see how the profit made on a different type of dwelling even though it is in the same subdivision has anything to do with the establishment of the profit on these houses.

You are going to have to do that by exact figures as to these dwellings and I just don't think this evidence is competent.

Mr. Anderson: Well, our point is, it bears to the reasonableness of the exact figures which we will produce.

By the Court: Well, I think that you can have him testify that the exact figures he produces are reasonable and proper and I think you can have other witnesses insofar as the Steel homes are concerned, other witnesses support that, experts, but I don't think you support it by showing what the profits are on a conventionally constructed house. I just think that that's not competent for that reason and the Court sustains the objection.

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(Whereupon, a short recess was taken, reconvening in open court at about the hour of 11:10 A.M., and the following proceedings occurred)

Q. Mr. Fortner, when did people first start moving into these houses after the grand opening? You are free to refer to Composite Exhibit No. 47 if you like?

A. I believe it was sometime in June, '61.

Q. June of—

A. (Interrupting) 1961.

Q. All right, sir. Now, after people started moving into the houses, what happened?



A. When they started moving in the houses, why, that's when our real complaints come from them. We were having our troubles as builders ourselves before, but our real troubles started with them complaining and it just kept the men, carpenters and plumbers and different ones, working, going back, back, all the time. They were complaining—they started using their kitchen cabinets and their kitchen cabinet tops and the tops were warped, they would buckle and

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come apart and this would take a week, two weeks, three weeks or sometimes maybe a day, but the carpenter would have to take it off and the plumber disconnected and the carpenter have to put it back and the plumber would have to connect it and the walls sometimes would have to be touched up by the drywall men and the painter would also have to come in and do something because they was all scarred up putting it back in.

This was on the cabinet tops and there were dozens of 'em having to be replaced and some houses two and three and four and they complained about the walls being wavy and the doors, closet doors, they—everyone was just running down the street after us all the time complaining about the closet doors wouldn't stay on the tracks.

They had just—it was nothing to have complaints, to have three or four doors off at a time and it just kept our men, which was almost impossible to fix, going back all the time trying to satisfy 'em and they couldn't get their work done and we couldn't—couldn't deliver our houses.

Q. You mentioned the closet doors. Would you tell the jury what the complaints were about the closet doors?

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A. Well, when you would go to open or close 'em they would jump the track. They had a little track that they

went backward and forward on and they, for some unknown reason, why, they were very thin gauge metal and they would vibrate or something and they would jump the track and some of them would fall off completely and some would just hang and this was a constant nuisance to them and to us and while these people were complaining they would do it in our sales office and soon they didn't want to buy and U. S. Steel homes.

Q. Now, what—you said something about wavy walls; what was that?

A. Well, after we would get the walls and the drywall men would finish and get them painted, why, they would show up these large waves in the walls, just curves in the walls and it was impossible almost to take them out and it was—it would cause our drywall man to work twice as hard as he ever had to work and it kept him on the job doing this longer and coming back and the walls had a certain amount of give to 'em where that they were connected and the device used to connect them with wasn't fastened right or firm and this caused an awful lot of trouble and it just kept

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our men trying to do conventional work all the time on prefabricated houses which should have went together without any problem.

Q. From your observation, how did the walls come in these packages? Did they come as one great big complete wall or—

A. (Interrupting) No, they came in sections. These sections had a packing of some type that held them together and it seemed to be some sections of walls that they had quite a bit of play in these packing ends on 'em to where that they wouldn't—you couldn't keep 'em in place, causing them to crack.



Q. The interior walls in these houses, uh, when the first houses were delivered, what type of studding did the interior walls have?

A. They had, uh, wood studding on the inside. It was no way as large as a two-by-four, but it was a wood studding on a twenty-four inch center, and most studding in conventional built houses are sixteen-inch centers.

Q. What did the interior studding, uh, well, did that remain wood in all of the seventy that were built out there?

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A. No, in a short time we found out that they had changed to a little U-shaped piece of metal. It was thinner than gutter material, or what I call guttering. I don't remember the gauge of the metal offhand, but this was used in place of a stud and it was glued to the drywall and we had a lot of trouble with these sections, a whole panel just falling off because the machine or something where the glue didn't hold to the metal, why, the whole section would let go, or one corner, or one side of it and that meant the drywall man would have to come back and do the whole wall over; the painter would have to come back and do all of the painting over and one time they had on the exterior walls, they were using plastic nails about an inch or an inch and a quarter long and we went in one house one day and all these nails had backed out. They were sticking out about a quarter of an inch. They all popped out.

Q. Was that after the wall had been pointed?

A. Yes.

Q. How did they—what did they have to do to fix that?

A. I don't remember what they had to do. I think they had to take the complete wall off of it

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and put on a new one and fix it another way—fix another way to attach it; this was contantly a problem.

Mr. Anderson: Excuse me, Your Honor; I will get one of my Exhibits out here.

By the Court: Now, is this the panel?

Mr. Reutlinger: Judge, I just think you had better get the man here who was there when the panel was delivered.

By the Court: I couldn't hear you.

Mr. Reutlinger: I think we had better get the man who was there when the panel was delivered rather than Mr. Fortner. We have not argued about the authenticity, but we sure do argue about the condition when delivered.

By the Court: I think that you had better let the witness state that he has seen this panel if he can.

Mr. Anderson: Oh, sure.

By the Court: And that it is one that was used. I am going to make a special admonition to the jury about it.

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Mr. Anderson: All right. Well, I am willing to enter into, certainly an agreed stipulation about it, Your Honor.

By the Court: Yes.

Q. Mr. Fortner, there is in the anteroom two portions of panels; are you familiar with those?

A. Yes, sir.

Q. Were they taken—well, are they U. S. Steel panels that were delivered to Golden Meadows?

A. Yes, sir.

Q. Can you tell us when they were delivered out there?

A. No, I don't remember exactly when. I saw a lot of panels delivered. I was there when a lot of trucks were moving.

In fact, they would call me out because they—I couldn't believe the amount of damage that would come off of the truck and they called me out to show me how, when they unloaded, so they couldn't be accused of doing it themselves when they unloaded it.





Q. These particular panels that are out here, uh, of your own knowledge, are they U. S. Steel's panels?

A. Yes, sir.

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Q. Now, there is a certain amount of damage to the drywall portion of these panels, Mr. Fortner. Well, let me ask you this first; when were these panels set aside for use as Exhibits in this litigation?

A. Uh, in—somewhere in '62.

Q. Shortly after the suit was filed?

A. I don't recall just exactly when.

Q. All right. Now, there is acertain amount of damage to the drywall on these panels, Mr. Fortner. Was all of that damage on there when the panels were initially set aside for use as Exhibits in this litigation?

A. No, sir. We set 'em aside because they were some of the bad panels. They were torn up very badly, but there was a lot of it has been done since then; been laying around all these years and slid around and moved around, so some of it has been done, now, since we saved 'em.

Mr. Anderson: All right; if the Court please, we would like to offer these panels into evidence. We are willing to stipulate that a certain—

The Witness: (Interrupting)

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I'd say fifty percent of it has been done since then.

Mr. Anderson: Not all of the damage that is shown to the drywall was there at the time they were set aside as Exhibits. It is unfortunate that they have had to be moved around a number of times and that this additional damage has been done.

Mr. Reutlinger: Judge, I don't believe this witness has said these particular panels, which, of course, he has seen—

By the Court: (Interrupting) You don't believe he said what?

Mr. Reutlinger: I don't believe this witness has said with regard to these particular panels, which, of course, he has seen prior to this trial, are the ones he can identify as to time and place of unloading; that he watched them being unloaded, and I don't believe he has yet told us what their condition was at the time of unloading and perhaps we should examine the witness out of the presence of the jury to see whether these materials can be enterd at this time.

What I am really seeking is to have the witness who saw these panels unloaded and I want to cross-examine him. I don't think Mr. Fortner really knows.

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Mr. Anderson: Well, if we may be heard in chambers—

Mr. Reutlinger: (Interrupting) That's what I suggest.

Mr. Anderson: (Continuing)—or out of the presence of the jury, I think it would be more appropriate.

By the Court: Well, I don't think we need to go out of the presence of the jury. I think the Court is prepared to rule on it and I'm going to allow you to introduce them, but I am going to give the jury an admonition about it.

Mr. Anderson: All right, sir.

By the Court: Now, ladies and gentlemen; the panels that have been under discussion here, the Court is going to allow you to view. I'm allowing you to view them for the purpose of noting the type of construction only.

You are to remember that these panels are eight years old; that they have been dragged in and out of lawyers' offices and up and down the steps of the Federal Building and their condition now is not indicative necessarily of what its condition was at the time of delivery and the only purpose I am letting



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you view these for is so you will have an intelligent understanding of the type of construction and how they were supposed to be placed in these dwellings and hooked together and matters of this type.

So, as far as their appearance is concerned other than the design of construction, you are not to attach any significance to their scarred up or damaged or weather-beaten appearance.

Mr. Anderson: Thank you, Your Honor. Before we do that, Your Honor, from a logistic standpoint we will be using them with a number of witnesses. I would like to figure out a place to set them up and leave them, if we may, Your Honor.

By the Court: Well, I haven't seen them myself, so I don't know what your problem is.

Mr. Anderson: Well, they are two feet wide and eight feet high and there are two of them.

By the Court: Well, can you prop them up against the wall here?

Mr. Anderson: All right, sir.

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By the Court: Now, fix it so it doesn't cripple one of my jurors. You can just pull that back somewhere and the Marshall will put it up here during the recess.

Mr. Anderson: This panel, Your Honor, has been marked as plaintiff's Exhibit No. 38 and we offer it with the Court's admonition.

By the Court: All right; let it be introduced in evidence.

(Whereupon, Plaintiff's Exhibit No. 38 was received in evidence)

Mr. Anderson: The second panel has been marked as plaintiff's Exhibit No. 44 and we would offer it in evidence under the Court's admonition.

By the Court: All right.

(Whereupon, Plaintiff's Exhibit No. 44 was received in evidence)

By the Court: What is that you have in your hands there?

Mr. Anderson: This is plaintiff's Exhibit No. 39, which is one of the studs

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taken off of it and of these and we would offer it also.

Mr. Reutlinger: If Your Honor please—

By the Court: (Interrupting) I want the jury to understand when that stud came off it wasn't broken off in the middle that way.

Mr. Anderson: Yes, sir; that was in my office.

By the Court: Yes. When the stud came off there, I want you to understand it was in perfect condition; I want you to understand that.

Mr. Reutlinger: If Your Honor please, the record, I assume, reflects that the stud and the two panels are being treated in the same manner with regard to objections and admonitions?

By the Court: Oh, yes, oh, yes; yes, the admonition embraces all of this paraphernalia here.

Q. Now, Mr. Fortner, plaintiff's Exhibit No. 44, does that depict the twenty-four inch center concept that you talked about earlier?

A. Yes.

Q. In other words, to shorten things here,

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this stud originally was glued up here on this end (Indicating)?

A. That is what we call a two-by-four—replacing a two-by-four.

Q. All right; and would you explain to the jury to the



extent that you know, Mr. Fortner, how these panels were used in the house?

A. The, uh, interior panels was put together with these holes on the end with a block of wood with two nails, like, in each side of it and that would drop down in place and hold 'em together and they wasn't always tight. I think where the slots were in the hole is where they fit in.

Q. All right.

A. Of course, each end had a—this wood there, it was just plain wood there to put your drywall on and you had to paint over and plaster that and there was no drywall to cover.

Q. Well, now—

A. (Interrupting) This, this panel here (Indicating) actually fell apart. They have been damaged an awful lot since then.

Q. Plaintiff's Exhibit No. 38, you talked about having to put plaster on the wood. I think it

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can be illustrated from this. Would you come around here?

(Thereupon, the witness did as requested)

Q. Is this an end panel?

A. Yes.

Q. This (Indicating)?

A. Yes, it's an end piece of plywood tacked on a piece of drywall. That was replacing another two-by-four and, on the very end, the two-by-four is showing and you had to put your drywall—

Q. (Interrupting) Well then, is it correct, sir, that this filler piece here (Indicating) goes up to that wooden stud up at the top?

A. That's right.

Q. And that the drywall men would have to put plaster at the end of that wooden stud up there at the top?

A. Yes, several places like that.

Q. All right. Now, were there other problems as these events were developing with the house packages besides those you have already told us about?

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A. Well, we had—uh, are you talking about the parts of the components of U. S. Steel?

Q. Yes, sir.

A. We had trouble with all of the gables. They were very, very thin plywood. They had a little less than two-by-fours, or two-by-twos, and spliced them together and they would just get big waves in them.

Q. Would you explain to the jury what a gable is?

A. The gable is the end that goes over the brick and up to the eave of the house and between—kind of a triangle affair.

Q. On the typical house and using a United States Steel prefabricated package, how big would the gable be, approximately?

A. Well, the brick would go up to where it squared off and so, some of the gables might be twenty, twenty-five feet wide—uh, long, and maybe four, five, six feet high, depending on the style of the house.

Q. All right; and what had to be done, to your knowledge, to correct the gable situation, and if you don't know, it is all right; I am sure somebody

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else does.

A. I don't know exactly how they corrected it.

Q. Were there other complaints about the components in the U. S. Steel package?

A. Well, we had trouble with all—most all of the windows. There were several of them that the people just



taken hold of 'em to do certain things with 'em and they fell right out.

The side tracks that the window would go up and down on was put on with a little staple gun like you would staple some newspaper together and they wouldn't lock. None of them would lock and they never did get that settled.

Q. Were you ever personally involved in a situation where one of the windows was pulled out of the wall?

A. I personally pulled one of them out. It was, uh, we had one floor—in our showroom there to show the different parts, you know, and this is one of the things we had set up there that U. S. Steel sent to show how good the window was and after we had started getting all of these complaints, why, we couldn't hardly believe it.

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So, I walked over there one morning and just pulled on it a little bit and the whole window jumped out.

Q. I'll show you what has been marked as plaintiff's Exhibit No. 19(b) and ask you if you can identify that photograph; do you know when it was taken and who took it?

A. It was taken the morning that, uh, we pulled the window out.

Q. Were you present when that photograph was taken?

A. I'm not too sure.

Q. All right; do you know offhand who took the photograph?

A. I would—it would just be a guess. I think Earl Smith taken it; I'm not too sure.

Q. All right; let me ask you this, Mr. Fortner; did you see that window in the condition depicted by the photograph?

A. Yes.

Q. Does that photograph truly and accurately reflect the condition which you yourself observed?

A. Yes.

Mr. Anderson: On that basis,

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Your Honor, we will offer the photograph into evidence.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 19(b) was received in evidence)

Mr. Anderson: This is plaintiff's Exhibit No. 19(b), Your Honor; may I circulate that one? (Doing so at this point).

Q. Now, in connection with the windows, still, were there any problems with the screens?

A. We had problems with almost all of the screens.

Q. Would you tell the jury about that?

A. Well, they wouldn't fasten and they was just next to nothing for—far as screens were concerned. You just couldn't do anything with 'em. They wouldn't stay fastened. You couldn't get 'em fastened.

Q. Did your people, uh, install these windows?

A. No.

Q. How did they come?

A. They come made in the panels; it came with

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the panel.

Q. Were there any types of windows that came separate, in other words, not in a panel, to your knowledge?

A. Not to my knowledge. I remember all of the doors, almost, was either—they would be hung wrong or they wasn't beveled so they would open. A door has to be beveled so it will open. And we would have to take 'em off and bevel 'em and maybe have lots of 'em changed or have to send a whole panel back where we had to have a right-hand door or a left-hand door.





Q. What do you mean by beveling?

A. Well, two pieces fit up square together and they won't open out. They have to have a taper put on the edge of the door so that it would open out. They hadn't been hung properly. They were hung when we got 'em over there.

Another incident I recall was, on some of these houses, they had a lot of trim like the French models and different things on the garage doors and on the door itself, the molding, you know, decorative molding, and this just fell off and nobody had to bother it; it just came off.

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Q. How was it put on?

A. I assume that it was glued on, but it—whatever it was, it didn't hold. Of course, that messed up the front of a nice home when that trim would fall off.

Q. And would the people after they started moving in complain about all of these things that you've told us about?

A. Over and over, because there were some of 'em that there was no remedy to them.

Q. Where would these complaints take place?

A. Well, we got a lot of 'em by telephone. We got a lot of 'em in our sales office and going up and down the street, they would be out waiting for you and you'd be showing houses and you'd have to stop and they'd start telling you how bad the house was and then, of course, you wouldn't make your sale.

Q. Were complaints made in the sales office in the presence of the prospective customers?

A. Numerous times.

By the Court: Mr. Anderson; you will have to stand while questioning. I find that this gets fewer questions.

(General laughter at this point).

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Mr. Anderson: Yes, sir.

Q. After you started getting these complaints, Mr. Fortner, what was the reaction of the Zettwoch-Fortner sales force?

A. Well, it was very dim. They, uh, just one by one just kept losing interest. They just spent all their time and nights and Sundays and holidays and everything else out there and just got to where no type of advertising would pull any people, and it was—it just went down the hill day by day just because we couldn't deliver and the ones we did deliver we had trouble with.

Q. Now, sir, did you have complaints by the people that moved in about matters that didn't relate to the U. S. Steel package?

A. Yes.

Q. Uh, were those frequent complaints, infrequent complaints or what?

A. They were normal—I would say about normal. We had some complaints on some of the hardwood floors where you had to go back and put in a new board here and there. We had septic tanks—the rings in the septic tank, because the ground was sandy and the plumber would have to go back and fix that and that

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was the biggest part of it; something like that, very nominal.

Q. Did you have a plumbing subcontractor for this project?

A. Yes, sir.

Q. Under your arrangement with him was the septic tank problem a part of his responsibility?

A. That's right.

Q. What about the floors?

A. Same way.

Q. These various complaints that were not attributable



to the house package itself, were the majority of those covered by subcontracts?

A. I think just about all of them were.

Q. All right; did this involve any extra expenditure of money on the part of Fortner Enterprises?

A. Not to my knowledge.

Q. Now, what about the complaints that you have described to us resulting from the U. S. Steel package; how were those handled?

A. Well, Mr. Miles and his two foremen he had, why, they would try to handle the most of them themselves and, of course, they were constantly griping because they couldn't—it kept them busy doing this

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without any extra pay instead of building new homes and going on that way.

Q. Did the drywall have to be repaired very much?

A. The drywall—the drywall men just had one continuous fit. He was remodeling and repairing more than he was doing his new work all the time and, of course, they kept hollering for money and money extras and we kept telling 'em U. S. Steel was going to correct them if they could just hold on; that we had two hundred nineteen of 'em to build and we just kept telling 'em every day the thing would be corrected and the plumber and the painter and the drywall man would just go along with it. If we had been paying for that work it would have run into hundreds of thousands of dollars.

Q. Well, if I understand it then, you, by salesmanship and cajolery, and by whatever other means, were generally able to get these subcontractors to not charge extras for repairing the problems caused by the house package?

A. Yes, that's where I made the mistake; should have stopped long before I did.

Q. Now, Mr. Fortner, I show you plaintiff's

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Exhibit No. 60 and if you can, I'll ask you if you can identify that for us.

A. Yes.

Q. What is it?

A. It's a loan agreement.

Q. What—when is it dated?

A. The 2nd day of August, 1961.

Q. And what does that represent? Does that represent a second transaction with the Credit Corporation?

A. Yes, it does.

Q. Would you tell the jury about that?

A. It represented a second transaction of, uh, thirty-two lots, I believe, and we made the agreement just on the thirty-two lots just like we had on the first hundred and eighty-some.

Q. One hundred eighty-seven?

A. Hundred and eighty-seven. We made a new agreement with them on these thirty-two lots and, these thirty-two lots, why we didn't make the agreement in the first place, when Mr. Miles, our builder that I said before had been building in Golden Meadows, he had had these lots under option and he was building all the time and he had bought, under contract, thirty-two more

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lots from us, or, I mean under option, and so once he—once we hired him as our general contractor to build U. S. Steel homes, why, then he didn't have any more use for his thirty-two lots in the same subdivision. He'd have been in competition with us and with himself. So, we taken those back and made a deal with U. S. Steel just like we did in the first place.

Q. Now, what was the money for on this transaction?



A. Well, that time we were, uh, getting mighty low because we couldn't deliver houses and they wasn't moving fast enough and we were running short of money is the reason we threw it into that, plus we had a lot of people that was talking about—the few that we were selling, they was talking about building a bigger home in this other section and, seemed like they found out we had some lots over there and they liked that section, too, and we wanted to throw it all in one deal.

Q. All right. While these complaints were being made about the house packages out there that you have told us about, did you communicate about any of this with the Homes Division of U. S. Steel?

A. Lots of times, and Mr. Miles did lots of times and Mr. Robinson did lots of times and Mr.

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Earl Smith did lots of times.

Q. Did any of the major complaints that you've told us about ever get corrected?

A. Well, the cabinet tops, right at the last, they started making a different type cabinet top after—after it was all done, practically, why, they come up with this post-form top and it seemed to be all right.

We had a lot of trouble with the tops of the kitchen cabinets. They, instead of being fastened to the studs, they were fastened to the drywall and we were scared to death for the people to put dishes in 'em; that they would come down.

Q. You mean the upper section of the kitchen cabinets?

A. Yeah, this whole top section.

Q. Well, what happened then after this second loan agreement had been signed; did you—when this second loan agreement was signed was this still in the period of time that you were receiving complaints?

A. August, yeah, we—yes, we had got started into it.

Q. Did you continue receiving complaints after that?

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A. Continuously, till we left there.

Q. What happened then next after that loan agreement was signed and you continued receiving complaints?

A. Well, we put on a completely new advertising program and tried to review the problems.

We went back over our models and dressed 'em up a little bit and I think we built two extra models that we didn't furnish; moved our office down the street because the action was going down the other way, that is, what there was and that's where the vacant lots was and we had filled the lots all around where the models were pretty much. That's about what we did with it right afterwards.

Q. Did you have any further contact then with the Credit Corporation at any time after this loan agreement was signed?

A. Later on after it was signed, we did, yes.

Q. All right, when?

A. Well, I believe it was in the fall, sometime in the fall of '61, September, October or November.

Q. What was the—

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A. (Interrupting) Well, we explained to them our problem and I believe they brought in Mr. Dyas, brought him down and he couldn't believe it. He just—he didn't doubt our word, but he said he just couldn't believe that anything could be that bad in a situation to where it was going to run us out of business and I told him, "All you've got to do is come out and look", and he again—I say again, but he promised that it would all be straightened out and he was going to look into it and he did look into it.

Mr. Day and some of them c[illegible] over there right away and each time, promised to do this and promised to do that,



but it just never got corrected and we told 'em at the time we had gone as far as we could go if it didn't because all sales were stopped and, the reason they were stopped, people were complaining so much because they couldn't get delivery and the—that the interest and the way we had arranged to build the houses there within a year, year and a half, and they wasn't getting nowhere and we were just breaking our back and were out of money.

At the time, we talked to him about going to another outfit and maybe we could come out and we'd pay his money back and he said it wouldn't be—he

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didn't think it would be necessary; that he'd straighten it out.

Q. All right; did it get straightened out?

A. Never did.

Q. What did you do then?

A. Well, we just kept plugging along and telling our salesmen to stay on the job and just kept trying and then the Home Show came along in the spring over at the Fairgrounds.

Q. The spring of what year?

A. 1962, I think it was, and we got the idea to, if we'd build a home in the Home Show, why, maybe that would excite things, to show the people that the house, you know—so, we built a house in the Home Show and all of our subcontractors cooperated and U. S. Steel cooperated and we got the house up. I don't think they would pay for it. I think we had to pay for it, but, uh, we built the house, put the house in the Home Show and, of course, it was just one nightmare.

We, uh, the closet doors wouldn't stay on the tracks and anybody that's been to a Home Show, they have such crowds that you go in one end and out the other and we had made a door in the back bedroom and

**(Vol. III, p. 85)**

they could get all the way through the house and, of course, there would be lines out there of a hundred, hundred fifty people to get in and the closet door would go off the track and we finally got the factory men from the door place to come over to see if he could get it to work, but it would last about five or ten minutes and it would be off again and, of course, any of them that they were using much and Mrs. Henry Scheirich, of the Scheirich Cabinet Company, she seen the house and she said, "These are seconds." She said, "I don't see how you got hold of these." I said, "They are shipments."

So, the Home Show, we didn't sell one house as a result of all that and it was quite expensive.

Q. I will show you a series of photographs marked as plaintiff's Exhibits 13 through 13-E and ask you if you can identify those?

A. Yes, this is a picture of the front of the Home Show house and this is a picture of Marlow Cook and Bill Cowger and myself in the kitchen.

They came out—he come out and cut the ribbon for us and here is the house and it shows the price on it and here are some of our salesmen and some of our customers walking along. We had a big yard in

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back of the house with all of our extras and giveaways and different things there and there is the Senator again, the President of the Home Show and President of the Builders Association and myself.

Mr. Anderson: All right. Your Honor, we will offer these in evidence.

By the Court: Let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 13 through 13-E were received in evidence.)



Q. You have told us, I believe, that you didn't make any sales while at the Home Show. Did the Home Show get you any sales later on?

A. Best of my memory that's just kind of the climax of this thing. They just quit there and we had some houses people didn't take that were started and—but we never could even sell those.

Q. When did the Home Show take place; you remember the month?

A. April, I assume.

Q. What happened after the Home Show?

A. Well, after the Home Show we tried to

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capitalize on all—we have everybody to sign a ticket if they want a chance on the television and we tried to call and write all these people and try to get them out to the subdivision and our general line of advertising.

Q. All right; was that successful?

A. Not at all.

Q. And what happened then?

A. Well, far as I said, nothing else happened. We, uh, got hold of Mr. Day again, I believe, and possibly Mr. Black and possibly Mr. Dyas and we just started talking about the building of this conventional house again and told them we could get figures on it and told them we could build it a lot cheaper than this prefab and we could build it quite a bit cheaper and we felt it would sell and that these houses had a black eye out there and we was wanting to figure out some way to pay the balance of the money back.

Q. By this time did you have salesmen that were willing to work out there?

A. Well, at this time we didn't have anybody willing to work. We had two that I talked into staying there most of the time.

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Q. And how many salesmen had you had working out there when the project first started?

A. Twenty some-odd.

Q. You mentioned the building of a conventional house. Had you investigated the cost of the conventional house?

A. Mr. Miles investigated very thorough and I went over the figures with him and, of course, this is his, one of his main businesses because he had figured up houses.

Q. What did you conclude as a result of that investigation?

A. Well, we concluded that we could make a real good profit off of them if we went to 'em and it would be a better house; they would sell because there was nobody else having those problems, you know.

Q. Was it going to cost more or the same or less than the comparable U. S. Steel package?

A. I thought it was $450.00 less.

Q. Now, did you have any further discussions with the Credit Corporation and U. S. Steel people about being allowed to build the conventional house or some other type house?

A. Well, we talked about it several times

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and that's when I went and talked to Mr. Hamilton to see if there was anything to be done about it or that could be worked out because they were all lawyers and I needed one.

Q. What happened after that?

A. After that, why, we had a meeting in Mr. Hamilton's office.

Q. Who was there?

A. Mr. Black and Mr. Dyas and Mr. Boyd and Mr. Reutlinger and Mr. Hamilton and Mr. Hopson, his partner and Earl Smith and myself and Mr. Miles. I might have left out somebody.



By the Court: Mr. Anderson, it is now twelve o'clock and so the Court will recess for lunch and, ladies and gentlemen of the jury, remember the admonitions of the Court and be back in your seat at 1:30.

(Whereupon, at about the hour of twelve noon a recess was taken for lunch, reconvening at about the hour of 1:32 P.M., and the following proceedings occurred.)

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Q. Now, Mr. Fortner, just before lunch you had told us that a meeting had taken place in Mr. Hamilton's office. I believe that you had told us that certain representatives of the Credit Corporation, the Homes Division and yourself and your organization and certain attorneys were there at that meeting.

Now, would you please tell the jury first of all when that meeting took place?

A. I believe it was in June of '62.

Q. And was it the first part of June, last part of June?

A. First part of it.

Q. Or the middle—say the first part of it?

A. First part of it.

Q. Now, would you please tell us just what was said at that meeting on behalf of your organization and what was said by representatives of the Credit Corporation and the Homes Division?

A. We had this meeting in Mr. Hamilton and Mr. Hopson's office and everybody was there that we said was there and we explained once again the problems we were having and that, uh, we explained to them that we were up to date at that time on our payments and we

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wasn't behind and, uh, explained to them that due to all these faulty materials and delays and all this that we should

have had a hundred twenty-five or a hundred fifty houses built and sold; that we had ate up the interest and that, uh, we were broke at the time—wasn't behind with nobody, but we were out of cash and the reason for it was, as I said, we were—had run out of money because we had had to pay all this interest just the same as if we had almost built out the subdivision because our time was gone and we told 'em about we could build a prefabricated house with another company's package cheaper and we told 'em about the conventional homes we could build cheaper and there was quite a bit of discussion.

I can't remember all of it, uh, but backward and forward about the situation through the Credit Corporation and the Homes Division and our end of it and it ended up by Mr. Dyas, which as far as I know is the head of the Credit Corporation, and he got very, very belligerent and said he had seen this little show before or heard it before or something like that and he said that good, bad or indifferent he didn't care how bad the parts were or whatever it was, that we had borrowed this money and that we were going to build

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their houses.

He got up and walked out of the room and the rest of 'em stayed for a while and I don't remember the conversation—very decent and they were very pleasant, but then the meeting ended.

Q. During the course of this meeting had you asked th Crdit Corporation to be relieved of the tie-in obligations that are set forth in plaintiff's Exhibit No. 56, 57 and 58 and plaintiff's Exhibit No. 5, which is the loan agreement?

A. We tried; we asked 'em about it. We tried every



way in the world to get released so we could save the rest of our subdivision.

Q. And was that when Mr. Dyas made the response which you have just told the jury?

A. That's right.

Q. Now, Mr. Fortner, did you subsequent to that meeting, receive a request from the Credit Corporation for an audit of the Fortner Enterprises?

A. Before the meeting?

Q. Subsequent; after the meeting.

A. Oh, yes.

Q. And was that audit made with Fortner Enterprises' consent?

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A. Yes, made by Ernst & Ernst, I believe.

Q. I will show you a document which has been marked as plaintiff's Exhibit No. 3 and ask you if you can identify that?

A. Yes.

Q. What is it?

A. It's a letter from Mr. Rollins, I believe, stating about all of the loans and when they come due and—

Q. To whom is the letter addressed?

A. A. B. Fortner, Jr., President, Fortner Enterprises.

Q. (And what is its date?

A. July 20, 1962.

Q. Did you receive that letter?

A. Yes.

Mr. Anderson: We would like to offer it in evidence, Your Honor.

By the Court: What Exhibit is it?

Mr. Anderson: Plaintiff's Exhibit No. 3.

By the Court: Let it be filed.

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(Whereupon, Plaintiff's Exhibit No. 3 was received in evidence)

Q. Read the first top paragraph of this page of that letter, please, sir?

A. (Reading)

"In view of your failure to pay the outstanding balance on construction note No. 1 on or before maturity and in view of your further failure to pay interest on the land notes evidencing both loans as required under the provisions of the notes, mortgages and loan agreements, the amounts outstanding under all notes evidencing your loans, together with the interest accrued thereon, are hereby declared to be due and payable pursuant to the provisions of said notes, mortgages, and loan agreements, and demand for payment thereof is made herewith."

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Q. Mr. Fortner, to simplify this thing; is this letter a demand for payment of all balances outstanding?

A. Yes.

Q. Now, sir, would you please tell the jury the result of the refusal to relive you of the obligation to build the United States Steel packages, which refusal occurred during the first part of June, 1962, at the meeting at Mr. Hamilton's office?

A. Well, the result was that, uh, we couldn't sell our lots; we were tied completely.

We couldn't, uh, build any more houses. We couldn't build anybody else's houses or couldn't build any conventional house and, like I said, we couldn't sell our lots.

They wouldn't do that unless we built U. S. Steel homes on 'em, so we had no way, as we were out of cash, to pay



'em back and the reason we were out of cash is on account of the interest piling up due to the delay in delivering the packages and with the faults in 'em.

Q. Did this have any effect on the anticipated profits for the houses that had been sold and on those on lots where houses had not been built?

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Mr. Reutlinger: Well, if Your Honor please, I'll object to the form of the question; on houses that had been sold you could probably not anticipate profit. You could account for and determine. I understand anticipation is in the future.

By the Court: I think you will have to separate the two; I'll sustain it.

Mr. Anderson: All right, sir.

Q. Mr. Fortner, on any profits which had been made or any income which had been derived from the sale of houses which had already been built what had happened to that money?

A. It had all been paid out in interest.

By the Court: It had what?

The Witness: It had all been paid out in interest.

Q. It had all been paid out in interest?

A. (Witness nodded head affirmatively).

Q. All right; the second part of the question then, Mr. Fortner; as a result of this procedure that you have told us about what effect did that have on the anticipated profits for the balance of the subdivision on which homes had not been built?

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A. Well, we had no cash. We had paid it all out and we couldn't build any other kind of a home. So, it just absolutely stopped the subdivision. There is no way in the

world to go on with it because there is no way we could go; no direction.

Q. Now, then, sir, after you had received the July letter which has been identified as plaintiff's Exhibit No. 3, what happened then?

A. I believe the next thing is when we got my lawyer, Mr. Hamilton, and started to file a procedure—file suit procedure.

Q. All right. Now, let me take you back, Mr. Fortner, all the way back before the—uh, October 28, 1960, loan agreement was signed. You mentioned this morning in your testimony certain figures had been prepared before that loan agreement was signed insofar as the cost and the pricing of the houses were concerned; is that right?

A. That's right.

Q. Now, would you tell the jury just how you went about preparing those figures?

A. Well, I had Mr. Herman Miles and Mr. Clarence Smith do a lot of it and then they would converse with me when they got some figures. We

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prepared 'em by taking the price out of the book with U. S. Steel, different models and the lots and the firm contract that we had and come up with a price.

Q. Now, just in general, what were the types of firm bids or contracts that you are talking about here?

A. Oh, we had firm bids on the painting and on the plumbing and on the concrete work and wiring.

I can't think of anything, hardly, that we didn't have firm bids on. We had firm bids with Mr. Miles and I think all of it was just firm bids.

Q. All right; and after you had gotten this, uh, these figures prepared, did you work up prices for the houses?

A. Yes, we did.



Q. And in preparing the prices for the houses did you include a profit for Fortner Enterprises?

A. Yes, we did.

Q. Would you explain to the jury the method that was used in including a profit for Fortner Enterprises to the price of the house?

A. Well, we taken all of the expenses and, uh, taken what we thought the market would stand and

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hold it down—the sale price, as low as we could so we could meet all competition and which we did, and taking the price of the lot off and we came up with a profit.

Q. Now, what had you contemplated or anticipated at the time would be the fastest selling and most economically selling house of the prefabricated houses in the subdivision?

A. Which of the models would sell the fastest?

Q. Yes, sir.

A. Well, that was kind of hard to say. We worked with the B-1 mostly. That was the smaller home and we governed a lot of things around that because that was our competition house; it was the smallest price house.

Q. All right; now, this B-1, was that a designation given a particular model house by United States Steel?

A. Yes.

Q. As far as construction was concerned what type of foundation would a B-1 be put on?

A. It could either be put on a crawl space or a slab—a concrete slab.

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Q. All right; which is the least expensive, the slab or the crawl?

A. The slab.

Q. What was the original price put on the B-1 slab when you first started the project?

A. Including the closing costs?

Q. Yes.

A. I believe it was $11,250.00.

Q. $11,250.00. Now, Mr. Fortner, was the price of the B-1 slab subsequently raised?

A. Yes.

Q. To what figure?

A. I believe it was raised about $150.00 to $175.00, something like that, to $11,400-something.

Q. I show you plaintiff's Exhibit No. 26 and ask you if you can identify that, sir?

A. Yes.

Q. What is it, please?

A. It's a price list of the Golden Meadows and the U. S. Steel homes.

Q. All right; does it show the B-1 slab on it?

A. B-1 slab.

Q. First of all, uh, we would like to offer

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this into evidence, Your Honor, as plaintiff's Exhibit No. 26.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 26 was received in evidence)

Q. What is the price of the B-1 slab on that price list?

A. $11,400.00.

Q. What was the reason for the increase in the price of $150.00?

A. I believe the price of the package from United States Steel went up.

Q. All right. Now, I show you a second document which is identified as plaintiff's Exhibit No. 27 and ask you if you can identify it, sir?

A. Yes.



Q. Would you tell the jury what that is, please, sir?

A. The estimated cost of the U. S. Steel homes.

Q. Is that figure or sheet prepared to reflect the increase in the house package that you have

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mentioned that resulted in the increase in the cost of the B-1 slab?

A. Give me that question again.

Q. Does that document—is that cost estimate, as prepared there, does it reflect the increase in the house package cost on the B-1 slab on the first page, Mr. Fortner?

A. Yes.

Q. All right. Now, what is the total cost for the basic house package of the B-1 slab as shown on that document?

A. $10,690.90.

Q. Now, sir, does that document have reflected on it all of the firm bids or contracts from the subcontractors and suppliers that you have told us about before?

A. Yes.

Q. Does it have in it any closing cost figures?

A. I don't see it on here.

Mr. Reutlinger: Have we identified this document yet; plaintiff's Exhibit 27, I think it is.

Mr. Anderson: Twenty-seven.

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Mr. Reutlinger: Hasn't been introduced though.

Mr. Anderson: I thought it had; I'm sorry. We would like to offer it in evidence, Your Honor.

Mr. Reutlinger: No objection.

By the Court: Let it be filed.

(Whereupon, Plaintiff's Exhibit No. 27 was received in evidence)

Q. The second item on there, Mr. Fortner, is FHA appraisal.

A. Right.

Q. Is that a part of the closing costs?

A. That's a part of the expense, appraising, yes.

Mr. Reutlinger: Note an objection to the leading question, now, if Your Honor please.

By the Court: Yes.

Mr. Reutlinger: The witness has qualified himself as a businessman and an expert and I would prefer counsel not to point out items on

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there. It's very important that we have—

By the Court: (Interrupting) All right; I am sustaining the objection.

Mr. Anderson: May I ask the witness to carefully go through the document and see if there are any other items which might be designated as closing costs?

Mr. Reutlinger: Would the Court indulge me? I did not catch the colloquy here, but I made that objection on the witness's answer to the question. Could I ask the reporter to read it back to me?

By the Court: All right; read back what he wants to hear, Mr. Reporter.

(Thereupon, portions of the preceding testimony were read by the Reporter)

Mr. Anderson: That was not the answer, Mr. Sterling; it was close.

Mr. Reutlinger: What I want is the reporter to read it to me.

Mr. Anderson: The answer was that is part of the expense of closing.

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By the Court: Well, you will have to take him through it again then if you don't want that.

Mr. Anderson: If the Court please, as I understand it,



the question that is before the witness is that, uh, if he will go through the list and see if there are any other items that are attributable to closing costs; is that permitted?

By the Court: Yes, sir.

Mr. Anderson: Thank you.

The Witness: FHA appraisal, $25.00; stamps, deed and release, $25.00; discount, $300.00.

Q. All right. Mr. Fortner, what—uh, is there a figure on that sheet for the lot?

A. Yes, sir.

Q. What is the amount of that figure?

A. $2,000.00.

Q. Does that $2,000.00 figure represent the actual cost of the lot?

A. No, sir.

Q. What does it represent?

A. It represents the price of the lot including the profit.

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Q. All right; and what is the amount of profit included in that $2,000.00 figure?

A. I don't know exactly, but it's $400.00 and something, I believe.

Q. All right. Now, if my mathematics are correct, uh, the $10,690.00 figure which is the cost as shown on that sheet and taken from the price amounts to $709.10; is that correct?

A. That's right.

Q. And is it correct that we, to that $709.10, we add the $400.00 plus profit in the lot that you told me about?

A. That's right.

Q. That is a total of $1,009.10 putting those two figures together; is that right, sir?

A. That's right.

Q. And does that represent the gross profit on the B-1 slab?

A. That's right.

Q. Were there overhead and operating expenses of the Fortner Enterprises not reflected in this $1,009.10 figure, Mr. Fortner?

A. Yes, there are some.

Q. Are there any overhead figures appearing

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on plaintiff's Exhibit No. 27?

A. Overhead and insurance, $40.00.

Q. Do you know what happened to that particular item?

A. Went for insurance, mostly, I guess.

Q. Why wasn't additional overhead figured into that cost breakdown, Mr. Fortner?

A. Well, we had firm bids including U. S. Steel price package and it didn't seem to be necessary.

Q. Did you have any funds in that cost breakdown for advertising?

A. No.

Q. Why not?

A. Because the advertising is mostly borne by Zettwoch-Fortner sales.

Q. And is there a cost item on this sheet for Zettwoch-Fortner?

A. Yes.

Q. What is it?

A. Commission, $300.00.

Q. Was that a contracted or a firm bid item?

A. Firm. Part of it went to the company and part of it went to the salesmen.

Q. At the time the houses were priced



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initially and at the time the prices were increased that you have told us about what profit actually, net profit, did Fortner Enterprises except to receive from the sale of these houses?

A. Net profit?

Q. Yes, sir.

A. Well, the lowest figure we had was approximately $900.00; maybe a few pennies over on the low—cheapest house and then we had it figured on up as high as $1200.00 and $1300.00 on some of the higher models, bigger models.

Q. All right. Was this B-1 that we have been talking about the cheapest priced house?

A. Yes.

Q. Now, this difference between the $1,009.10 figure, the gross profit figure, why is that different there, Mr. Fortner?

A. The difference was so we could be sure. We wanted to have something we could really count on, assuming that maybe some overhead would come up along the line or something.

Q. All right. Now, the complaint that has been filed on behalf of the Fortner Enterprises in this case claims $900.00 per house. Why was that figure

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asserted as the claimed lost profit?

A. Well, this was the figure, uh, that we come up with and, in advice through counsel, we arrived at that.

Q. Well, does it basically—

Mr. Reutlinger: (Interrupting) Note an objection to the leading question, if Your Honor please.

By the Court: Yes, I'll sustain that.

Mr. Reutlinger: He's already said why it was.

Q. All right. For how many lots is Fortner Enter-

prises asserting the claim for damages for lost profit in this case?

A. Two hundred nineteen.

Q. I believe you have already testified that there were 187 under the October 28, 1960, loan agreement?

A. That's right.

Q. How many were under the August, 1961, loan?

A. Thirty-two, I believe.

Q. All right. If my mathematcis aren't

(Vol. III, p. 110)

incorrect, I hope that 219 times 900 comes to $197,100.00; is that right?

A. Right.

Mr. Anderson: May I have a couple of minutes with Mr. Hamilton, Your Honor?

By the Court: Yes. Now, would the jury like about five minutes while we are waiting? Let's take five minutes.

(Whereupon, at about the hour of 2:08 P.M., a short recess was had, after which the following proceedings occurred)

Q. Now, Mr. Fortner, taking plaintiff's Exhibit No. 27, let us go as insofar as this B-1 model is concerned, through this cost item by item and I want you to give me each item of the costs and tell me what it is for, please, sir?

A. Engineering, $40.00.

Q. All right; we will have to go slowly because, uh, all right, sir?

A. That was to survey the lot and the boundary survey and the topo of the land and divide it up over so many lots to come to this.

(Vol. III, p. 111)

Q. What is the next item?

A. FHA appraisal, $25.00, and that's a fee you have to pay FHA to appraise the property for loan value there.



Q. All right; the next item?

A. Permit and water meter, $88.85. That's a permit to get the water meter and plus the water meter.

Q. What is that figure again?

A. $88.50.

Q. $88.00 or $80.00?

A. $88.00.

Q. All right; was that an established figure for all houses?

A. Yes.

Q. All right. Were all of these established figures for all houses?

A. Yes.

Q. All right; what is the next one?

A. Well, now, all of the figures on the B-1 was established. They change some of 'em as we go down the line like concrete.

Q. Yes, sir.

A. But the water meter—well, it changes

(Vol. III, p. 112)

on another model.

Q. Well, let me put the question this way; insofar as the B-1 model was concerned?

A. Right.

Q. Were these the required figures on all houses?

A. Right. Concrete work, $850.00. That included pouring the concrete slab, slab, the porch and the sidewalk and steps.

Q. Did that include all of the concrete work to be done?

A. Yes.

Q. On a B-1 slab?

A. Yes.

Q. All right; what is the next item?

A. Ground treatment. That's termites treatment that

the FHA requires, $35.00. Package house including tax and freight from U. S. Steel, $3,098.90.

Q. What was that figure again, sir?

A. $3,098.90.

Q. All right; the next one?

A. Electrical work, included all of the electrical work including the fixtures—I believe

(Vol. III, p. 113)

the fixtures were furnished by U. S. Steel.

Q. All right.

A. $203.00. Heating, $243.00.

Q. What did that involve, sir?

A. Beg your pardon?

Q. What did that involve?

A. That included the furnace and ducts to the rooms to heat the house, thermostat.

Q. Electrical work, uh, what did that involve?

A. It included wiring the house.

Q. All wiring?

A. All of the wiring. Plumbing, $950.00.

Q. Did that include the plumbing fixtures?

A. That included the plumbing fixtures, the plumbing and the septic tank.

Q. That figure represents the entire cost of the plumbing for a B-1 slab house?

A. Right.

Q. What is next?

A. Carpenter, painting, floor, and so forth. Now, this is the work that was done by Mr. Miles and Mr. Robinson and Mr. Bolin, $541.00.

Q. All right.

(Vol. III, p. 114)

A. Drywall, $176.00.

Q. What did the drywall work consist of?



A. Well, the section would come like this from U. S. Steel and the drywall man had to go in and tape them up and put mud over 'em and grind 'em down wherever there was a joint and fix it to where it—

Q. What is mud?

A. Plaster.

Q. The next item, sir?

A. Lumber. Don't ask me what that was or where it went, $27.50. I don't know. Floor covering, $185.00. This was a slab house so they had to put the asbestos tile all over the entire floor.

Q. Does it, uh, does this represent the cost of the labor and materials, too?

A. Right, complete; absolutely complete.

Q. All right.

A. Ceramic tile, wall or floor in the bathroom, $85.00.

Q. All right.

A. Gutters, downspouts and roofing, $69.00.

Q. All right; what is that?

A. That was—I'm not positive where the breakdown was, but that roofing was glazed roof, I

(Vol. III, p. 115)

believe. Mr. Miles and Mr. Robinson would know a lot more breakdown, but I think the roof was delivered with the U. S. Steel package material; I'm not positive of that.

Q. Were all of these items we have covered up to now including this last one subject to firm bids on contracts?

A. Yes.

Q. All right; what is the next one?

A. Finished grade, shrubs, trees and seed.

Q. Okay.

A. I skipped one here, the masonry.

Q. Let's get the finished grade, shrubs, trees and seed since we have got that.

A. All right; $72.00.

Q. Does the term "finished grade" include rough grade if it is proper?

A. Does it include rough grade?

Q. Yes, sir.

A. No.

Q. Who did the rough grading of the property?

A. The contractor that built the roads rough-graded the property.

(Vol. III, p. 116)

Q. All right. Was the rough grading of the property already done?

A. Yes.

Q. All right. Does this $72.00 figure represent a firm bid or contract?

A. I can't be sure about that.

Q. What is the next item?

A. Masonry.

Q. What was it?

A. $553.00.

Q. What does that represent, sir?

A. That's all of the finished concrete work. This other figure a while ago I must have told you wrong. It was just for the slab.

Q. All right; were these brick houses?

A. I'm sorry; got me mixed up; that's for the brick.

Q. What is the next item?

A. Did you get that one, $553.00?

Q. Yes, sir.

A. Sod—did we get that?

Q. Before we get any further with the sod, on the basis of the cost of the brick did that include laying the brick?

(Vol. III, p. 117)

A. Yes.

Q. Was that a firm bid or contract?



A. Yes.

Q. All right. Now, what about the sod?

A. The sod was a firm bid, $100.00.

Q. What portions of those lots were sodded?

A. The front, all of the front and around the side to the back of the house and from the back of the house to the back of the lot was seeded.

Q. Seeding is included in this other item over here?

A. Yes, I gave you that.

Q. All right; what is next?

A. I gave you driveways, $50.00.

Q. What was done with the driveways?

A. They were graded and graveled.

Q. And was that a firm bid?

A. Yes.

Q. What is next?

A. Overhead, liability insurance, $40.00. That wasn't a firm bid. I know all that didn't cover it.

Q. All right.

A. Supervision fee.

(Vol. III, p. 118)

Q. Who was that?

A. That went to Mr. Miles.

Q. How much was that?

A. $300.00.

Q. Was that a firm arrangement?

A. Firm.

Q. With Mr. Miles?

A. Firm arrangement.

Q. All right; what is the next one?

A. Stamps, deed and release, $25.00; that's federal stamps that goes on the deed.

Q. At that time what was the going rate for federal stamps?

A. A dollar and ten a thousand, wasn't it?

Q. All right; that would be $12.65 for the federal stamps on a $11,400.00 house?

A. Well, we had releases.

Q. Well, now, I know, but I'm trying to break it down, Mr. Fortner; the stamps would be $12.65 at $1.10 a thousand, if my mathematics are correct?

A. (Witness nodded heard affirmatively).

Q. Does that look right to you?

A. A dollar ten a thousand.

Q. All right.

(Vol. III, p. 119)

A. Accounting fees.

Q. Just a minute, Mr. Fortner. What was—what did you mean by deed there?

A. We had to prepare a deed and furnish the buyers a deed to the property that he bought.

Q. What did that cost?

A. Well, it, altogether here, stamps, deed, release, $25.00. I don't remember the individually.

Q. Do you remember what the release cost?

A. I don't know; $2.50—I ain't so sure.

Q. What was the next item?

A. Accounting fees, $34.00.

Q. Was that an agreed figure?

A. That was an agreed, firm figure all the way through.

Q. Who was that with?

A. With Wetterer Accounting Firm and Mr. Cooper.

Q. John Cooper?

A. John Cooper.

Q. All right.

A. Then we have a total of $7,790.90.

Q. Now, all these figures you have given us up to now that total $7,790.90, what do they represent?



(Vol. III, p. 120)

A. They represent what it costs to build the house.

Q. All right; are these the total costs—

A. (Interrupting) No.

Q. (Continuing)—for building the house?

A. No. I have it here.

Q. Well, you have some other costs to add to this?

A. Yes.

Q. All right; what are those other costs?

A. The lot.

Q. And what is that?

A. $2,000.00.

Q. And—

A. (Interrupting) Real estate commission.

Q. Just a minute, please; on the lot, is this the $2,000.00 figure which you have referred to earlier in your testimony in which there is included a profit?

A. Right.

Q. That profit is $400.00-plus?

A. $400.00-something.

Q. All right; what other costs do you

(Vol. III, p. 121)

have?

A. Real estate commission, $300.00.

Q. I believe you told us before that that was paid to Zettwoch-Fortner?

A. Right.

Q. All right.

A. Discount.

Q. What is that, sir?

A. $300.00.

Q. Would you explain to the jury what that represents?

A. That represents—uh, represents points or percent-

age of money that the mortgage company charges to make the loan. That varies up and down, goes as high as seven, eight or nine and sometimes used to be down to—there wasn't any and it just varies all along; it's a fee they charge.

Q. Well, was this an estimated figure?

A. Uh, not at the time; it was the right figure.

Q. Did they have a set rate at the time?

A. Yes.

Q. Did you follow that set rate?

A. Yes.

**(Vol. III, p. 122)**

Q. All right; what is the next item?

A. Interest, estimated.

Q. How much is that?

A. $300.00.

Q. On what basis was the interest estimated and what interest was this?

A. This was interest that we owed to U. S. Steel.

Q. And on what basis was it estimated, the $300.00 figure?

A. Well, we had our auditor to estimate it, but it was taking what we borrowed and what we were going to borrow and how long it was going to take us to build, per house, to pay back each time; this is what we came up with.

Q. All right, sir. Now, any other expense or is that the total?

A. It's the total.

Q. What does that come to?

A. $10,690.90.

Q. All right; and is this $10,690.90 figure the same figure to which you have referred earlier this afternoon in your testimony?

A. Yes.

**(Vol. III, p. 123)**

Q. Now, then, to arrive at the $900.00 per lot profit



figure to which you have referred earlier, I want you to go through this again. You testified that the house was priced at $11,400.00?

A. That's right.

Q. Is that correct?

A. (Witness nodded head affirmatively).

Q. And from that we subtract these total costs that you just told us about of $10,690.90?

A. (Witness nodded head affirmatively).

Q. Is that right?

A. That's right.

Q. And then, if I understand, the total profit, gross profit, the $400.00 profit of the lot is shown in that $2,000.00 figure; is that correct?

(No Response).

Q. Now, just so the jury will understand, we add the gross profit figure here (Indicating) of $1,119.10—where did you get the $900.00 net profit figure?

A. Well, we first started out before we raised the prices, I assume, is where it come in at.

Q. Well, why the net profit of $900.00, Mr. Fortner?

**(Vol. III, p. 124)**

A. Well, on the first, that was the—until we, uh, we figured when we first started after we went a while we would pick up momentum and we would raise the prices, but right on the very start real low and we had $900.00 or better and we rounded it off and, as I say, on some of 'em we had $1,100.00 and $1,200.00 profit, but we rounded 'em all off and we made the suit of $900.00 across the board.

Q. I believe that you indicated earlier that the difference between gross profit here of $1,119.10 and $900.00 represented anticipated overhead?

A. We did anticipate some, but very little.

Q. You mentioned the project—after the project ob-

tained momentum raising prices; would you tell the jury what you mean by that?

A. Well, when we started out, why, most subdivisions do this; they start out and if they go over good, why, to get 'em going good, you put down the lowest profit you possibly can live with and if the houses get to moving good and you can deliver, why, you can raise your prices and this is what we intended to do, but we never did pick up this momentum. We had to raise our prices some because of the U. S. Steel

(Vol. III, p. 125)

package raise.

Q. Were you ever able to raise your prices to increase the profits?

A. No, no time; they wouldn't sell at the originnl price.

Q. Mr. Fortner, calling your attention to plaintiff's Exhibit No. 27, do you have that before you, sir, the cost breakdown?

A. Yeah.

Q. Is there also on that same Exhibit a cost breakdown for the other models of homes that you were building in Golden Meadows that involved the United States Steel prefabricated package?

A. Yes.

Q. And were all of the costs on these other models also the subject of the same firm bids as reflected on that sheet with the ones for the B-1 model?

A. Exactly, yeah.

Q. Does that include the first page, which has reference to the houses built on slabs and the second page which has reference to houses built on the crawl?

A. Yes.

(Vol. III, p. 126)

Mr. Anderson: That's all for the plaintiff.

By the Court: Mr. Reutlinger, we have about fifteen



minutes before we adjourn for the day. Do you want to start or do you want to wait until in the morning?

Mr. Reutlinger: I would prefer that, if Your Honor please.

By the Court: Wait until in the morning?

Mr. Reutlinger: Yes, if I am only going to have fifteen minutes.

By the Court: All right. Ladies and gentlemen of the jury, we will conclude for today and remember the admonitions of the Court and do not discuss this matter among yourselves nor with any other person and do not allow it to be discussed in your presence, sight or hearing and be back in Court at 9:30 in the morning.

(Whereupon, at about the hour of 2:45 P.M., an adjournment was taken, to reconvene on Thursday, June 4, 1970, at 9:30 A.M.)

**TRANSCRIPT OF PROCEEDINGS**
**VOLUME IV**

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Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Thursday, June 4, 1970.

**(Vol. IV, p. 3)**

The Captioned matter was called by the court at about the hour of 9:30 A.M., and the following proceedings occurred:

By the Court: All right, Mr. Anderson.

Mr. Anderson: I just have a couple of additional questions of Mr. Fortner.

By the Court: All right; come around.

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Mr. A. B. FORTNER, JR., having been previously duly sworn, was examined further and testified as follows, to-wit:

Direct Examination Continued by Mr. Anderson.

Q. Mr. Fortner, I hand you what have been identified as plaintiff's Exhibits 6-A, 6-B, 6-C and 6-D and ask you can identify those, please, sir?

A. Yes, sir.

Q. What are they, please?

A. They are mortgage notes that were made on the second loan agreement.

**(Vol. IV, p. 4)**

Q. That is—what date do they bear?

A. August 2, 1961.

Q. All right. Now, so the record will be celar, by the second loan agreement, are you referring to plaintiff's Exhibit No. 6?

A. Yes.



*Testimony of Mr. A. B. Fortner, Jr.*

Q. All right. Now, Mr. Fortner, is Exhibit 6-A one of the notes?

A. Yes.

Q. How much was it for?

A. It was for $2,950.00.

Q. And what is—how much is Exhibit 6-B for?

A. Beg your pardon?

Q. How much is 6-B for?

A. $59,000.00.

Q. And how much is Exhibit 6-C for?

A. $403,400.00.

Q. Now, the Exhibit 6-C, what does that note represent?

A. That was the note to purchase the packages of the construction of the homes.

Q. All right. Now, what does Exhibit 6-B represent, the $59,000.00 note?

**(Vol. IV, p. 5)**

A. The $59,000.00 note was the acquisition of the lots.

Q. All right. Now, the $2,950.00 note, Exhibit 6-A, what is that?

A. $2,950.00 was a penalty note provided we didn't pay 'em on time—pay it back like we was supposed to.

Mr. Anderson: That's all I have, Your Honor; thank you. Oh, I'm sorry; I move their admission into evidence, at this time.

By the Court: All right; let them be filed.

(Whereupon, Plaintiff's Exhibit Nos. 6, 6-A, 6-B, 6-C and 6-D were received in evidence)

Cross-examination by Mr. Reutlinger.

Q. Mr. Fortner, when I cross examine you in some measure you might think I am being repetitive. I will try not to be and we will move ahead as fast as we can.

*Testimony of Mr. A. B. Fortner, Jr.*

**(Vol. IV, p. 6)**

On your direct examination you did give us some idea of your past experience in this business, however, I would like to ask you, say in 1960 when you had been in business for about twenty years, the extent of your—and when I say "your", I am including your corporations and all other corporations that you were engaged in with regard to the real estate business; you had Zettwoch-Fortner?

A. Yes, sir.

Q. And you owned all of the stock in Zettwoch-Fortner?

A. Yes.

Q. Now, when did you first acquire the controlling or the entire interest in the Zettwoch-Fortner?

A. 1946.

Q. That would be maybe fifteen years before the 1960 date, or fourteen years?

A. 1946.

Q. Prior to that time who was in the Zettwoch-Fortner Corporation with you?

A. Mrs. Aline Zettwoch.

Q. I see; this is where the Zettwoch comes from?

**(Vol. IV, p. 7)**

A. Yes.

Q. And I presume you bought her out in 1946 as you have told us?

A. Right.

Q. Now, in 1960 or 1959 or thereabouts where was the principal office of the Zettwoch-Fortner located?

A. We moved somewhere along about that time from Sixth and Jefferson to 4125 South Third Street; I don't remember the date.

Q. That is where your office is at the present time?

A. Right.



*Testimony of Mr. A. B. Fortner, Jr.*

Q. I believe you told us on direct examination that Mr. Day came out to your Third Street office so perhaps you had moved shortly before that visit?

A. This—this is true.

Q. How many branch offices did Zettwoch-Fortner have at that time?

A. Uh, one branch.

Q. And where was that branch located?

A. That was on Dixie Highway.

Q. And that is sometimes called 18th Street Road?

A. Yes.

**(Vol. IV, p. 8)**

Q. How far out?

A. We were at Pleasure Ridge.

Q. Is that near Valley Station?

A. It's about three or four miles this side.

Q. Be north of it?

A. North, right.

Q. Yes, sir; well, let's go then into Fortner Enterprises. About the time of 1960, 1959-60, at that time you owned all of the stock in that corporation?

A. Whenever it was formed, I owned all of the stock in it.

Q. Well, now, Fortner Enterprises, and that's the plaintiff in this action, was formed, I believe, back in 1956. You didn't own all of the stock in it at that time, did you?

A. That was the Gold Rose Gift Shop, I believe at that time, wasn't it?

Q. Yes, sir; that was the name at that time; it's the same corporation, though, isn't it?

A. No, I didn't own all of the stock in the Gold Rose Gift Shop.

Q. And we will get into that in a minute,

**(Vol. IV, p. 9)**

how that grew, but by virtue of the name change and the

changing of the corporate powers in 1960, you owned all of the stock in Fortner Enterprises?

A. Whenever it was formed I owned all of the stock in it.

Q. All right, sir. Not when it was formed, because it was formed in 1956, I believe?

A. Well—

Q. (Interrupting) At this time—well, that's all right.

A. They changed names.

Q. Yes, I understand.

A. Yes.

Q. Now, Fortner Homes was in existence in 1959 and '60?

A. Yes.

Q. During that two-year period what was the scope of its business enterprise; where was it operating?

A. I don't remember right at the moment where it was operating. It had built several houses in the past, but at that particular time I don't remember what it was doing.

Q. Well, it could not—could or could not

(Vol. IV, p. 10)

have been active?

A. That's right.

Q. How old or how long had Fortner Homes been in operation in 1960; how old was it?

A. I don't recall exactly.

Q. Well, can you tell me approximately how many years that corporation had been?

A. Approximately ten, eleven years.

Q. I am not going to pin you down here, Mr. Fortner; I'm just trying to get some general background, really, for my own information on this point.

(Witness nodded head affirmatively).



Q. And the principal activity of the Fortner Homes as you have told us, was building homes?

A. Subdividing.

Q. And subdividing lands?

A. Yes.

Q. You would do the whole thing?

A. Yes.

Q. Would it be a fair statement to say that within the context of the framework of this particular transaction which we are discussing in this lawsuit that Fortner Homes was engaged in the same type business?

(Vol. IV, p. 11)

A. I don't remember whether they were active at that time or not.

Q. I don't mean active, necessarily, but generally speaking, over the ten-year period had it been engaged in that same type business?

A. It had been.

Q. Yes, and was in existence at this time?

A. The corporation was in existence.

Q. And you don't know whether it was active or not?

A. No, I don't recall.

Q. But the Fortner Homes had been in the business of buying lands, developing land, subdividing it as you say, then building homes on it and selling them?

A. Yes, sir.

Q. All right; which is the same as Fortner Enterprises in this transaction, isn't it?

A. Just about.

Q. Not only just about; it's just exactly the same, isn't it, Mr. Fortner, what you did here would be?

A. We built homes in both of 'em and subdivided.

(Vol. IV, p. 12)

Q. That's right. Now, at the time—now, not at this

time, and I will go into your Iroquois Developers in more detail later, but we know that Mr. Robards owned half of that stock and you owned the other half shortly before this transaction?

A. Yes.

Q. How old or how long had Iroquois Developers been in existence?

A. How long had they?

Q. Yes, at 1960?

A. Strictly another guess.

Q. I appreciate that; your best judgment.

A. In 1950.

Q. Say ten years, just—

A. (Interrupting) Prior to—

Q. (Interrupting) 1960.

A. Prior to 1960?

Q. Yes, sir.

A. Approximately, yes.

Q. And what had Iroquois Developers been doing during that ten-year period in 1950 and 1960?

A. Mostly subdivision, subdividing, and I believe there was some homes built in it.

Q. All right; and had you and Mr. Robards

(Vol. IV, p. 13)

been fifty-fifty owners of that corporation during that period roughly or had you had others in it?

A. Best of my memory, I started building a subdivision called Iroquois Vista and we had two sections of it, number one and two, and the best of my memory, Mr. Robards came in on the second section. I owned the first section by myself.

Q. Then he came in?

A. And I took him on as a partner in the second section.



He was doing all my engineering and he liked the project and so I taken him in as a partner.

Q. Can you give me the approximate date when Mr. Robards joined Iroquois Developers?

A. No, sir.

Q. Was this early in the game?

A. I don't remember.

Q. Yes, sir. Now, not including stock in the corporations that—like General Motors or things like that traded on the stock exchange, but in corporations, you had a large interest, or in the instance of Zettwoch-Fortner and Fortner Enterprises that you owned all of the stock, did you operate under any other corporations during the period 1959 and 1960?

A. Mr. Robards and I had a corporation

(Vol. IV, p. 14)

called the Bellvedere Corporation in which we owned apartment houses. Now, what years, I can't recall.

Q. Any others?

A. Well, let's see, now, how many did you name?

Q. Well, I've got Zettwoch-Fortner.

A. That's the second one.

Q. I'm sorry; Zettwoch-Fortner, Fortner Enterprises, Fortner Homes, Iroquois Developers and Bellvedere Corporation.

A. I—I can't think of any more.

Q. Bellvedere, sir, is that big apartment down on Fourth Street?

A. Fourth and Hill.

Q. Fourth and Hill?

A. Un-huh; Urban Renewal has torn it down now.

Q. You sold it to Urban Renewal, didn't you?

A. Mr. Robards did.

Q. That's right; he had bought you out before that, hadn't he?

A. Yes.

Q. I may be digressing a bit, but was part of

**(Vol. IV, p. 15)**

this sellout by you to Robards of the Bellvedere connected with your Iroquois or was that separate, or did you trade?

A. Give me this again.

Q. Well, we know that you acquired Robards' interest in Iroquois Developers and you just told me that you sold your interest in the Bellvedere Corporation to Mr. Robards; was this a trade?

A. No, sir.

Q. A separate transaction?

A. Separate transaction.

Q. Yes, that's right. Now, in addition to the corporations you have just mentioned, were you involved in any real estate business or anything connected with real estate businesses in 1959 and 1960 on your own as an individual?

A. Every now and then we would do—build some houses on our own. I don't remember what years, but I did 'em on my own far as the corporation.

Q. Aside from your home or vacation homes that you may own, in 1959 or 1960 did you hold any real estate in your own name for business purposes, let's put it that way?

A. Yeah, I owned some investment property.

**(Vol. IV, p. 16)**

Q. Yes, sir; where was that located?

A. I can't remember all of it.

Q. Well, can you just give us a little rundown of the investment property you remember that you owned in that period? Now, I'm speaking of real estate investments?

A. I don't remember addresses; I'm sure we owned two, three, four cottages in the West End, probably, and three or four houses out the Dixie Highway.

Q. This is all?

A. And my interest in the Bellvedere which—



Q. (Interrupting) Well, we know about the interest in the Bellvedere; are you a member of the Louisville Real Estate Board?

A. Yes, sir.

Q. Are you what is known in the trade as a realtor?

A. Yes, sir.

Q. And how long have you been in that association?

A. I believe I joined in 1942—'42 or '43.

Q. Very early in your career?

**(Vol. IV, p. 17)**

A. Yes.

Q. Does the—well, no, I don't think that is pertinent. Now, you have told us, I believe, yesterday on direct examination, that you have worked with during your career, uh, maybe twelve or fifteen entire subdivisions which encompassed several thousand lots.

Can you give me some idea of the dollar volume of those transactions as a whole? It would run into millions, wouldn't it?

A. No, sir; no, sir; couldn't.

Q. Well, it would run into millions, wouldn't it?

A. I wouldn't want to esimate it.

Q. Well, we have here a transaction involving two hundred nineteen lots and you have just read into the record, uh, loan figures which are in the one and two million category. Didn't you just do that, Mr. Fortner, a moment ago?

A. No, they didn't run into the millions, did they?

Q. Well, maybe I—we will get to that in a minute. I thought—

A. (Interrupting) One was $2,900.00.

**(Vol. IV, p. 18)**

Q. Maybe it was yesterday; the loan agreement you put in the record?

A. You said what I read just a minute ago.

Q. I'm sorry; my fault. The loan agreement, the first one you signed had an aggregate figure, I believe, of $2,055,000 and some odd hundreds?

A. That's what we borrowed.

Q. Yes, sir; you didn't borrow it all at once?

A. No.

Q. But you certainly had a right to borrow that much?

A. Yes, yes.

Q. And the second one in 1969 was the smaller and it only had thirty-two lots and it ran about $465,000 and some odd?

A. Nineteen when?

Q. Sir?

A. Nineteen hundred when? 1969, you said?

Q. If I said that, I was mistaken; '61.

A. Yeah.

Q. That in loan agreements involved about $465,000 and that's the second one in this transaction?

A. I don't remember the figures.

**(Vol. IV, p. 19)**

Q. Well, whatever is on the record.

A. Right.

Q. And that was the thirty-two lot transaction?

A. Well, what I just read was the thirty-two lot transaction.

Q. Yes, sir. Well, now, refreshing your recollection with that, can you tell me how much money was involved in the development of the twelve to fifteen subdivisions involving several thousand lots and in round numbers, or your best judgment?

A. I—I don't know.

Q. All right.





A. We didn't put money in all these subdivisions; we put the know-how in it.

Q. Yes, sir; I understand that, and, of course, it's what you told us; you didn't put your own money in this one?

A. No, sir; wasn't necessary.

Q. I understand, but what I'm asking is the amount of money involved, not necessarily whether you put it in or not, and you don't know?

A. I wouldn't have no idea.

Q. All right. Now, specifically, Mr.

**(Vol. IV, p. 20)**

Fortner, the plaintiff here, of course, we know, is Fortner Enterprises and I have submitted to the Court on Monday the Articles of Incorporation of the old Gold Rose Gift Shop and amendments to the Old Gold Rose Gift Shop where you changed its name, and a third amendment under the name of Fortner Enterprises and I have got photostatic copies here and certified copies of this, which your counsel has seen and this is your signature, of course, on August 28, 1956, isn't it?

A. Yes, sir.

Q. And this is the Articles of Incorporation of the old Gold Rose Gift Shop?

Mr. Anderson: We will stipulate that those are.

Mr. Reutlinger: Fine.

By the Court: It is agreed, ladies and gentlemen,—

Mr. Reutlinger: (Interrupting) And I ask that these be offered and the reporter has them.

By the Court: Let them be filed.

Mr. Reutlinger: As defendant's Exhibits Nos. 1, 2 and 3.

**(Vol. IV, p. 21)**

(Whereupon, Defendant's Exhibit Nos. 1, 2 and 3 were received in evidence.)

Q. Now, until you amended, Mr. Fortner, on the 26th day of October, 1960, this corporation was not authorized to engage in the real estate business, was it?

A. I believe that's right.

Q. All right, sir. Do you know on whose advice the corporation changed its powers so it could engage in the real estate business two or three days before this transaction was used; I'm speaking of the first one.

A. Uh, I was using Mr. Sam Steinfeld.

Q. Yes, but—

A. (Interrupting) At the time, and I'm sure the lawyer—

Q. (Interrupting) Your lawyer?

A. Yes.

Q. At that time you also had some business connection with Mr. Ed Horn, didn't you, in 19—

A. (Interrupting) We did lots of business off and on with Mr. Horn.

(Vol. IV, p. 22)

Q. Yes. Now, that's the Louisville Mortgage Service, I believe, isn't it?

A. Yes.

Q. That is his company?

A. (Witness nodded head affirmatively).

Q. Would you tell the jury briefly what the Louisville Mortgage Service is and what its function is as related to your type of business?

A. It's a mortgage company that makes loans on real estate.

Q. It is financing, basically, isn't it?

A. Yes.

Q. The Louisville Mortgage Service wouldn't undertake to build a house, would it?

A. I don't know.





Q. Well, did it undertake to build a house for you?

A. No, sir.

Q. How long have you known Mr. Ed Horn, give or take, you know?

A. Twenty-five years, probably.

Q. And to your knowledge, how long has he, or with the Louisville Mortgage Service before that, with the Louisville Title Insurance Company, been

(Vol. IV, p. 23)

engaged in the mortgage loan business; your best judgment again?

A. I would think he's been in the mortgage business ever since I knew him.

Q. That would be twenty, twenty-five years,

A. Yes.

Q. When did you first start, and I know it's not necessarily continuous, but when did you first start your business relationship with either Mr. Horn or the Louisville Mortgage Service or working with that particular financial institution, generally?

A. I started with Mr. Horn when he was with the Louisville Title Company.

Q. Yes, sir.

A. And he wanted to go in business with me and develop some ground.

Q. How long ago was that?

A. Oh, approximately—

Q. (Interrupting) Your best recollection.

A. '46, '47, '48; somewhere in there.

Q. Did he help you with the financing arrangements for it at that time?

A. We didn't go through with that deal.

Q. Well, has he ever helped you with

*Testimony of Mr. A. B. Fortner, Jr.*

**(Vol. IV, p. 24)**

arranging for financing prior to this particular transaction which we are talking about today?

A. I—

Q. (Interrupting) When I say 'he', you understand I mean Louisville Mortgage Service or his company?

A. I'm sure he has. I can't remember how big or little or the individual houses or what, but we did business generally with him all along.

Q. Yes, all right. Now, turning your attention to Mr. Herman Miles, how long have you known him, give or take?

A. I knew Mr. Miles about a year or two before we got into this U. S. Steel deal. So, that would be—

Q. And what—how did you all meet or get together; business relationship, isn't it?

A. I met Mr. Miles through one of my real estate salesmen, Earl Smith.

Q. Was Mr. Smith your supervisor or one of your—

A. (Interrupting) Mr. Smith?

Q. (Continuing)—one of your managers, so to speak?

**(Vol. IV, p. 25)**

A. He was Sales Manager part of the time and part of the time he would manage some of our small construction or building.

Q. Did you have any business relationships with Mr. Miles before this transaction?

A. Before?

Q. Before this particular transaction we're talking about in this law suit?

A. Yes, Mr. Miles was purchasing lots from us in Golden Meadows and building homes and we were selling for him and insuring 'em.



*Testimony of Mr. A. B. Fortner, Jr.*

Q. Oh, you were not at that time undertaking to build either yourself or through any of your corporations?

A. Yes, we were building a few scattered homes here and there.

Q. Yes sir; that's out in Golden Meadows?

A. We built a few there; they were started different places.

Q. Were you building those in partnership or in connection with Mr. Miles or any of his corporations, if you recall?

A. Best I remember the homes we built out there was with a Mr. Clements Smith, another salesman

**(Vol. IV, p. 26)**

in the office.

Q. Yes, not Mr. Miles?

A. I don't remember the exact first relationship with Mr. Miles exactly.

Q. Well, did you ever build any homes either through Mr. Miles directly or with one of his corporations or with one of your corporations jointly?

A. I don't remember.

Q. Now, at that time I believe that Mr. Miles was President of the Cook Lumber Company?

A. Uh, he either owned it or had some—I don't remember his exact title.

Q. Well, he had a connection?

A. He controlled it.

Q. Controlled it; that's good enough. He likewise, I believe, controlled the Apex Homes?

A. I believe he was the head of it.

Q. Well, you don't know whether he controlled it or not?

A. Far as I know he did, yeah.

Q. Allright; and similarly, he controlled Creston Homes about the time of this transaction?

A. I think he did.

Q. Did he control any other corporations of

(Vol. IV, p. 27)

which you have knowledge and which were connected with this project or were engaged in the real estate business about the time of 1959 and 1960?

A. Not to my knowledge.

Q. Now, moving on, Mr. Fortner, to this particular transaction I believe you told us when we took your deposition in April of this year, and I think you have touched on it when you were on the stand yesterday, that you had heard of the Homes Division Product through the trade journals that you read in the course of your business?

A. I believe that was the first time I heard.

Q. Yes. You at that time had no individual or personal knowledge of the product or just simply saw an ad in a trade journal?

A. I believe that's right; yes, sir.

Q. Allright sir; and you did not make any attempt to reach the United States Steel Home Division over here in New Albany nor did they make any attempt to reach you up to that time, did they?

A. Up to that time.

Q. Say the middle of 1959?

A. That's right.

(Vol. IV, p. 28)

Q. And then I believe you told us that Mr. Edmondson, who was one of your salesmen or Sales Manager, brought to your attention that there was some financing available in connection with this business and that he had talked to a friend of his who was doing some project down in Nashville; is that right?





A. That's right.

Q. And I believe then you next suggested to Mr. Edmondson as your agent that he pursue this and find out more about it from the people across the river in New Albany?

A. I—I think the way it was, he asked me if we—if I would like for him to talk to them and find out more about it and I told him at the time I was interested in talking about any deal.

Q. He was working for you?

A. Yes sir.

Q. And you either told him or he asked you if he could and you said that would be allright, to find out more about this transaction?

A. That's right; any man walks into my office and wants to talk about a deal, that's business.

Q. No one walked into your office—

A. (Interrupting) Edmonson did.

(Vol. IV, p. 29)

Q. Well I know, but he is your—

A. (Interrupting) That's right.

Q. No one from the outside walked into your office?

A. Not at that point.

Q. Allright; and you instructed Mr. Edmondson, or told him it would be allright for him to find out more about the transaction?

A. That's right.

Q. And as you told us yesterday, he did this?

A. That's right.

Q. Prior to this time you had already seen some advertising about the product in the grade journals?

A. I saw a picture of a house or a cutaway and their name on it.

Q. And you made no real examination?

A. No sir.

Q. You just knew that they had a prefabricated house?

A. I knew that they had a prefabricated house; knew it was U. S. Steel's company.

Q. Then, as you told us yesterday, there

**(Vol. IV, p. 30)**

was some—either phone calls or visits and then you set up a conference in the latter part of 1959, at which time there was, as you have told us, a very general discussion about financing and a very general discussion about the product; that nobody had their pens out to sign any papers; this was in the area of first negotiations?

A. Yes, yes; we just talked it in general, about how good the houses were and the financing available and how easy the house was to put together and all that.

Q. Yes, but it was a general discussion?

A. General.

Q. Yes.

A. Several of them were general.

Q. Well, I feel sure you didn't—no one either on your side or ours walked right in the first day and signed papers, did they?

A. No sir.

Q. It's a big operation?

A. Right, sir.

Q. Now, at that time, at this conference in 1959 even though you were not committed to it because this was in the nature of a general discussion,

**(Vol. IV, p. 31)**

did you suggest that you could put in $55,000 by way of equity in land in the project before it got off the ground?

A. I don't remember just word for word what was discussed.

Q. Well, I am sure you don't, Mr. Fortner, however I draw your attention to Plaintiff's Exhibit, or, tendered Exhibit No. 1, that Mr. Anderson tendered into the record on Monday and direct your attention to Document—we're going to have trouble here I think.



A. Get mine out of the way.

Q. Well, oh yes, fine; Document 54 and you see that on the bottom there?

A. Yeah, I see it.

Q. And it's a report of a meeting. The date of the document is December 22, 1959?

A. Yes sir.

Q. And it reports or it is Mr. Day reporting to Mr. Harry Black about a request you made for special financial assistance for the Fortner Enterprises and you did go over and have a meeting with Mr. Day, didn't you?

A. I don't remember when.

Q. Well, did you ever have a meeting with

**(Vol. IV, p. 32)**

Mr. Day before December 22 in 1959?

A. I don't remember.

Q. Could you have?

A. I just don't remember.

Q. Well, you don't even remember whether you could have met with him before December 22nd of 1959?

A. I know I met him several times. Now, when it was—the exact dates I don't remember.

Q. Well, could you have met with him in December or prior to December 22nd of 1959?

A. I don't remember.

Q. All right; in any event, this document shows that the estimated breakdown of the land cost would be—I mean I don't want you—you can see it here?

A. Yes.

Q. It's not too well printed.

A. Go ahead; that's all right.

Q. Ninety-six lots?

A. I'll take your word for it.

Q. At $1,100 each and three lots at $2,100 each and then of course you have a development cost for the ninety-six lots which, because of their price

**(Vol. IV, p. 33)**

of $1,100, are undeveloped—development costs of another $1,000 and then you have represented at least according to this report that you would put $55,950 of your equity in the land and this was not a commitment, but certainly a basis for discussion.

Do you recall any discussion along that line at that time?

A. Well, we were in several meetings going backwards and forwards, figures, and Mr. Day was the one that helped me work all that up and come up with those.

Q. Well, but Mr. Day—

A. (Interrupting) Those figures.

Q. (Continuing) Mr. Day certainly is not able to commit you as to how much money you intend to put in a project, is he? That is up to you, isn't it, Mr. Fortner?

A. That's right.

Q. So that if Mr. Day put down on that report that it was possible, and I am not saying you were committed at all, but that it was possible that you would—

A. (Interrupting) Somewhere along the line we had some equity. We had two hundred nineteen lots.

**(Vol. IV, p. 34)**

Q. Well, but I'll get to that in a moment, but ultimately the two hundred nineteen lots were bought and paid for with borrowed money, weren't they?

A. Most of it, yes.

Q. Not all of it?

A. Well, most of it.

Q. But in any event, the report that we have looked at, which is part of the Plaintiff's tendered Exhibit No. 1,



shows that it was suggested that you—when I say you I mean the Fortner Corporation, put about $55,000—$55,950 to be exact?

A. In probably equity.

Q. In equity; it might be in land?

A. Yes.

Q. It might be in money, but it was —

A. (Interrupting) It wasn't money.

Q. Well, it was something you didn't borrow; it was something you had?

A. You'all agreed to lend all the money.

Q. Sir?

A. You'all agreed to lend all the money.

Q. I understand that, but we didn't agree to lend the money to Fortner until the 28th day of October of 1960, did we?

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A. If I would have agreed to put up some cash I'm sure you would have held me to it.

By the Court: Well now, let's don't be argumentative, Mr. Fortner; just answer the questions.

Q. Did you, and I'm not saying, Mr. Fortner, you even agreed to put in $55,000, but was the figure of $55,000 of equity from Fortner Enterprises, either cash or in land, and as you indicate more probably land, was that discussed prior to December 22, 1959?

A. I don't remember whether it was—when it was discussed.

Q. Al right. Now, the negotiations progressed, as we know and as you have told us, right on and I'm not trying to pin you down whether it was a Tuesday or Wednesday or Thursday, but certainly in December, January and February—December, 1959 and January and February of '60, there were further negotiations between your interests and Homes Divisions's interests?

A. We had several meetings.

Q. Yes, sir. Do you recall either attending a meeting or writing a letter which prompted more discussion where you indicated you did not care to put

**(Vol. IV, p. 36)**

any of your property or money into the deal, but instead wanted a hundred per cent financing on the land acquisition and development?

A. This was our terms. We went backwards and forwards till we reached these terms.

Q. But this is what you wanted all along then?

A. That's right.

Q. Allright, uh, however let's look at Document 51, which is a sub-part of Plaintiff's Exhibit No. 1 and it's going to be even harder to read than the other, Mr. Fortner, I hate to tell you.

It starts out by saying—now, this is dated, I believe Jan-7, 1960?

A. Yes sir.

Q. And of course the reference is to your Corporation, the Fortner Enterprises, that's correct there, can you make it out; you almost have to take my word for that.

A. I take your word for it.

Q. Allright; it is awful tough. It purports to have been signed by Mr. Rollins, doesn't it?

A. Yes sir.

Q. And it says that on January 6, 1960 a

**(Vol. IV, p. 37)**

meeting was held with A. B. Fortner, Jr., attended by Messers. Day, Grayson and Cowart of the Homes Division and Dyas and Rollins of the Credit Corporation for the purpose of discussing the financial request which was the subject of Mr. Boyd's letter of December 30, 1969. At such meeting it developed that Mr. Fortner had completely



changed his proposal as originally made to the extent—Ken, do you have a better copy?

Mr. Hamilton: It is not very good.

Mr. Reutlinger: Well probably I can go on.

Q. (Continuing) To the extent that he desired a loan commitment covering the entire project of 155 undeveloped and approximately 31 fully developed lots; Mr. Fortner indicated that the only way he would proceed in this undertaking would be on the following basis, and then there is a detail, but the detail, in effect says a hundred per cent financing. I mean, this appears in this document?

A. Yes sir.

Q. Did you, in fact, attend the meeting on January 6, 1960?

A. I am sure if that says it does, I did.

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Q. Now, I have got this out of order. When the memorandum that we've just read refers to the change in your position, and again, Mr. Fortner, I want to impress on you I am not implying or suggesting that you had made any firm commitment—no one had at that point, but had you earlier told them that instead of a hundred per cent financing you wanted or would be willing to put in some money or property as indicated in—

A. (Interrupting) I don't recall this—this—of course this letter is not for me.

Q. I realize that, Mr. Fortner, but I am asking did you, in fact, suggest that you might put in—be willing to put in some of your own money or property?

A. Best of memory or knowledge, we were depending—Golden Meadows was moving along normally and we had all these lots and we thought we, if we could get the financing to get through with 'em all at one time in a hurry and a profit, why, that would be a good business deal.

*Testimony of Mr. A. B. Fortner, Jr.*

Q. It would be a good business deal for Fortner Enterprises?

A. Yes sir.

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Q. Allright; I'm sure it would, but if I understood you a moment ago, you really are unable to say whether or not you actually at any time even suggested that you might be willing to put up or risk some of your own property or money in the transaction?

A. I don't recall any deal except, uh, that they would submit me different deals and that may be what they are talking about, but I can't remember ever accepting anywhere along the line, and I think that's what this is saying, that I am holding to that.

Q. No, Mr. Fortner, I emphasized a moment ago—

A. (Interrupting) Yeah?

Q. (Continuing) That I didn't mean to imply or suggest that you had made a firm proposal which was subject to acceptance or rejection. I am simply speaking of a suggestion made by you—not a request by them, that you might be willing, not that you are committed to it, but that you might be willing to put some money or, as you say, more likely property, land into this transaction to the extent of $55,000?

A. When I was doing the talking I only remember the deal that I made.

Q. Well, the deal you made was made in

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October, wasn't it?

A. Well, that was the deal we talked about all the way through to the best of my memory.

Q. All right. Now, was there a further conference in February of 1960 where you—with roughly the same group?

A. We had a lot of conferences with them.



*Testimony of Mr. A. B. Fortner, Jr.*

Q. Well, that's not fair to you, is it, without looking for some of this stuff. I'm sure you did.

A. If the record says we did, why, we did. I'm aware of it if you can find it.

Q. I'll show you Exhibit No. 66 of Plaintiff's tendered Exhibit No. 1 and asky you if this—it certainly purports to be a copy of a memorandum from Rollins to Dyas, dated March 1, 1960?

A. That's from the Credit Corporation, yeah, Credit Corporation.

Q. And then it reads in part that as a result of a call received from Mr. Fortner on February 26, 1960, a meeting was held today in the office of Mr. Sam Steinfeld, attended by the following, and that of course I'm sure refers to March 1, 1960, and I was off by a month, Mr. Fortner, Mr. Sam Steinfeld, Mr.

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Edward Horn, but I think his name is Edwin though, isn't it—well, that's all right.

A. Yeah.

Q. Edwin Horn, Paul Grayson, Rollins, and Leonard of the Credit Corporation, at least that is what it reads here, doesn't it?

A. Yes, that's—it's true if it's there.

Q. Yeah. Now, this meeting, of course, did not result at that time in anybody signing any papers or contracts until a day or so later, did it?

A. I don't recall.

Q. Well, your contract wasn't signed until October.

A. Well, I just don't recall when it was signed, what date.

Q. Yes. Well, all right, but in any event you did have the meeting of March 1, 1960 instead of February like I told you—I'm sory; and you attended it and Mr. Steinfeld at-

tended it and Mr. Edwin Horn attended it and of course the U. S. Steel representatives of the Credit Corporation and the Homes Division?

A. (Witness nodded head affirmatively.)

Q. Well, it already appears that Mr. Steinfeld was your attorney at that time, wasn't he?

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A. Yes sir.

Q. And he was acting for you at this transaction, wasn't he?

A. Yes sir.

Q. Steinfeld, today I believe is a Judge on the Kentucky Court of Appeals, isn't he?

A. Yes sir.

Q. And that is the highest Court in this State, isn't it?

A. Yes sir.

Q. And Mr. Ed Horn attended that meeting as financial advisor at your request, didn't he?

A. I think that is right.

Q. And we have already discussed Mr. Horn's general business and relationship with you?

A. (Witness nodded head affirmatively.)

Q. So, in March—March 1st to be exact, of 1960, you had gotten serious enough with these negotiations to ask, and I am certainly not being critical of you because I am all for lawyers having employment.

You had gotten serious enough to have a lawyer and I think we will both agree a good one, to represent you in these negotiations and you had a financial advisor of some business experience also with you at

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that time, didn't you?

A. Yes sir.

Q. And they, of course, continued with you until the transaction was closed, didn't they?



A. I don't know about Mr. Horn; uh, Mr. Steinfeld did.

Q. Well, Mr. Horn, we know, of the Louisville Mortgage—

A. (Interrupting) I don't know what capacity Mr. Horn was there, I mean who for.

Q. Well, really, he is part of this transaction?

A. Yes. I don't remember just whether he was for it or against it or what.

Q. Well, certainly Mr. Steinfeld was on your—on your side, wasn't he?

A. He was my attorney.

Q. That's right; and he was with you throughout the transaction?

A. All of the legal part, yeah.

Q. Yes sir. Now, we know because you told us yesterday that you and I and Mr. Anderson have known for a long time that the project ran into a snag, and I am not being derrogatory about Mr. Robards, but it

**(Vol. IV, p. 44)**

didn't work out as we anticipated, uh, the Homes Division early in 1960, because you either had some difficulty with Mr. Robards and we would not accept him—in any event, tell us what happened, why you didn't move forward fast enough at that meeting in March of 1960, why you didn't make the contract shortly after that.

A. Why who didn't?

Q. You and the Homes Division and the Credit Corporation?

A. We, uh, Mr. Robards wanted to get in on the deal. So, we turned it over to him and I understand he went backward and forward some with the U.S. Steel people.

Q. And you certainly are informed and obviously—it obviously, in fact, did not work out because we have no contract with Mr. Robards.

A. That's right.

Q. All right. Now, the next move on your part, and perhaps Mr. Day talked to you about it, was to suggest that if Mr. Robards would get out of the picture that you could renew your negotiations and perhaps work something out which is—this is true, isn't it?

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A. We talked, Mr. Day and I talked about it.

Q. Yes.

A. Yeah.

Q. And, uh, you have already told us that you bought Mr. Roberts out, so you obviously felt well enough about that to want to get him out. How did you do that? Did you buy his stock in Iroquois Developers?

A. I think that is true.

Q. Yes. Well, I'm just trying to get the mechanics of it in my own mind.

A. Yes.

Q. Uh, it is true, I assume it's true that in March of 1960 when we looked at that last little memorandum, Iroquois Developers was owned—the stock was owned fifty per cent by you and fifty per cent by Mr. Robards?

A. It was before I bought the stock?

Q. Yes sir; before you bought it; yes sir.

A. Yeah.

Q. Then, because for—you don't care about the reasons, but Robards couldn't make the deal with Homes Division or the Credit?

A. I don't know why.

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Q. You don't know why?

A. No.

Q. You know they didn't?

A. Yes.

Q. All right; so that the other way to work it would



be for you to make the transaction with the Homes Division, only other possible way, and the Credit Corporation, which meant that Robards had to get out?

A. That's right.

Q. And the way you got Robards out was to buy all of his stock in Iroquois Developers which then left you the sole owner in controlling interest of Iroquois Developers?

A. That's right.

Q. So, at this point then, which is before we make the first contract in 1961 you now own a hundred per cent of the stock in Iroquois Developers?

A. It was all simultaneously.

Q. You didn't buy Robards out until the closing date?

A. I don't remember, but I was thinking it was simultaneously.

Q. All right; it might be. Certainly, the

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day after the transaction you had control entirely—control of Iroquois Developers entirely?

A. After I bought him out.

Q. Well, I—yes, that's right; after you bought him out you controlled it. What I'm trying to find out is when you bought him out?

A. I don't know what day it was.

Q. I am certainly not trying to pin you down to a day, Mr. Fortner; can you give me a month?

A. It was, I think about the time—simultaneously with U.S. Steel transaction.

Q. You did not get rid, and I don't mean to imply he is undesirable, but certainly he didn't fit into this picture. You didn't get rid of or buy Mr. Robards out during the summer or early fall of 1960?

A. I didn't buy him out until about the same time of the transaction.

*Testimony of Mr. A. B. Fortner, Jr.*

Q. All right; did you have a contract to buy him out before then?

A. We had a gentleman's agreement, by ourselves, when he was—

Q. Well, what you're telling me is that you had a verbal agreement.

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A. Well, I don't remember whether at the very last moment, whether we draw up a contract or not.

Q. I understand, but you were satisfied that he had made a commitment to you before you started negotiating again with Homes Division?

A. When he wanted on the deal he made commitments to me and when he got on the deal we made one to each other; that's right.

Q. Yes, I say, and I'm not interested about whether it was signed and sealed, but you were satisfied with his commitment to you that he would get out and you could proceed independently in the loan with this transaction sometime in the late summer or early fall of 1960?

A. It was the only way that I could make the deal.

Q. I understand that, Mr. Fortner.

A. United States Steel wouldn't go along with him in it; I had to buy him out.

Q. I understand that, but my question was not whether that was the only way you could make it. My question was, and at that time, and I'm not trying to pin you down to Thursday the 2nd of September or anything like that, but sometime late in the summer or

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early in the fall of 1960 you had a commitment to your satisfaction from Robards that he would get out upon payment to him of some money, I presume some, and you were free to independently pursue your negotiations with the Steel Corporation; is that true?



*Testimony of Mr. A. B. Fortner, Jr.*

A. We had an agreement if the deal went through with U. S. Steel that this would happen.

Q. All right; this is true then, what I have said, wasn't it?

A. I don't know whether you said the same thing or not.

Q. Well, I don't mean to labor on it; let's try it one more time. You did throw a contingency in and listen to me very carefully and check me if I am wrong.

It is true, isn't it, that sometime in the late summer or early fall of 1960 you had a commitment, an agreement, or call it anything you want, gentleman's agreement from Mr. Robards to the effect that he would get out of the picture, give up his interest in Iroquois Developers upon payment to him of some money, and all of this was to your satisfaction.

You didn't doubt that he would do that which he said he'd do contingent upon your ability to make a

(Vol. IV, p. 50)

firm deal with the Steel people?

A. Yeah.

Q. This is true, isn't it?

A. Yes, I had an agreement with him like that.

Q. Yes. Well, is what I have said true up to now?

A. Yeah.

Q. That, is the question. Yes, and by virtue of that, or by reason of that, you then felt free to move about indepedendently and without Mr. Robards to negotiate with the Steel people to see if you could reach an agreement, didn't you?

A. Yes, that's right.

Q. All right; and as a matter of fact I believe you wrote a letter, although I think you told us Mr. Day dictated it, but in any event you signed it—you wrote Mr.

Day a letter kind of recounting or telling about all that and I have a copy of that letter here and that, is the letter that we have been working with, isn't it?

A. (Witness nodded head affirmatively.)

Q. Is this the letter or copy of the letter you wrote Mr. Day?

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A. Yes, Mr. Day—I—when we got together and talked, why, he suggested that I write a letter and reopen the case and he felt like it would be all right and he said, "Better still, I'll write it and you sign it," and that's, that's what I did.

Q. Yes. You read it before you signed it?

A. Oh, I agreed to it; there's no—

Q. (Interrupting) Yes, but you pointed out—

A. (Interrupting) Just telling you what happened.

Q. (Continuing) His suggestion—surely, and—all right; I would like to introduce as Defendant's Exhibit No. 4, a copy of which has already been filed with the reporter—

By the Court: Let it be filed.

(Whereupon, Defendant's Exhibit No. 4 was received in evidence.)

Q. Now, as part of that transaction, and we are getting now down to the time where land has to be transferred from Iroquois Developers to Fortner Enterprises, doesn't it?

A. Yes.

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Q. And Mr. Robards is either out or has agreed to get out certainly to your satisfaction. Now, what did you have to pay either in property or money to Mr. Robards to relinquish his interests in the Iroquois Developers Corporation?



A. I don't recall the exact amount.

Q. Can you give us some idea?

A. I believe it was eighty or eighty some-odd thousand involved somewhere.

Q. Well, I'm not trying to pin you down, but what you're saying is that upon payment to Mr. Robards of eighty or eighty-five thousand or some substantial money thereabouts, and his agreement to accept that, he then transferred when he got paid all of his stock in Iroquois Developers and you, or Iroquois Developers paid him the money; that's the way it worked, wasn't it?

A. I believe so; yes sir.

Q. All right. Now, where would you get that money and when I say you, I'm speaking of the Fortner Enterprises. Where would Fortner Enterprises get that money, that much money to buy Mr. Robards out?

A. We got all of the entire money from U. S. Steel Credit Corporation for the entire deal.

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Q. Well, you borrowed it?

A. Yeah.

Q. From the Credit Corporation?

A. (Witness nodded head affirmatively.)

Q. Now, I may have the sequence of events wrong and I may not have them mechanically exact in my mind, but isn't it true that in broad outline that Fortner Enterprises, which is your wholly-owned Corporation, borrowed enough money from the—I'm speaking of the first transaction only—borrowed enough money from the Steel Credit Corporation to pay off Mr. Robards and then to buy the land, the one hundred eighty-seven lots of the Iroquois Developers?

A. We borrowed—Fortner Enterprises.

Q. Yes.

A. Yes, borrowed money, per lot, and all out of that money paid Iroquois Developers.

Q. Well, that's what I say; I may have the sequence of events wrong.

A. Yes.

Q. Well, let me get in proper sequence; what happened, as you indicate, is that Fortner Enterprises borrowed all of the money it needed to buy and develop the lots and paid it over to Iroquois Developers

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and then Iroquois Developers paid eighty or eighty-five of it to Robards to retire his stock, leaving you the sole owner of Iroquois Developers?

A. They didn't pay it over to Iroquois Developers.

Q. Who did they—

A. (Interrupting) Paid it to Robards.

Q. Well, I mean Iroquois Developers paid it to Robards?

A. No. Well, I—

Q. (Interrupting) I'm not trying to—maybe I am the one that is confused and that's easy to be. In any event Fortner Enterprises had no money at that time?

A. No.

Q. All right; and you had to get money to get Robards out of the picture to get those lots?

A. Yes.

Q. And all of that money came from the Credit Corporation?

A. Right.

Q. And when that happened Robards is gone with eighty or eighty-five thousand and you own all of the stock in Iroquois Developers?

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A. Right.





Q. And Iroquois Developers then has what is left of the money, but no more lots?

A. Left of what money?

Q. The difference between what you borrowed and the eighty or eighty-five thousand that Robards had?

A. Yes.

Q. All right.

By the Court: Let's take ten minutes, gentlemen; remember the admonitions of the Court ladies and gentlemen, and be back in your seats in ten minutes.

(Whereupon at about the hour of 10:27 A.M. a short recess was had, reconvening at about the hour of 10:40 a.m. and the following proceedings occurred:)

Mr. Reutlinger: If the Court please, when I earlier referred to Plaintiff's tendered exhibits, sub-parts 54, 51 and 66 or the Plaintiff's Exhibit No. 1, I over looked offering them in evidence as Defendant's exhibits, and I now offer in evidence in the event Plaintiff does not utilize these documents as exhibits, Plaintiff's sub-exhibit 54 of Plaintiff's Exhibit No. 1 as Defendant's Exhibit No. 107 and Plaintiff's sub-exhibit 51, a part of Plaintiff's

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tendered Exhibit No. 1, as Defendant's Exhibit No. 108 as sub-exhibit 66, as part of Plaintiff's tendered Exhibit 1, as Defendant's Exhibit No. 109.

By the Court: So ordered.

Mr. Anderson: We have no objection.

Mr. Reutlinger: I just wanted to get them in the record before I forgot to do it.

Mr. Anderson: Actually, they are simply identified as Plaintiff's Exhibit Nos. 54, 51 and 66.

Mr. Reutlinger: Is that right? Oh, I thought maybe they were sub-parts of No. 1. Well, Mr. Reporter, strike that reference to Plaintiff's Exhibit No. 1 then and we

would ask that they be cross-referenced with the Plaintiff's Nos. 54, 51 and 66.

By the Court: All right, so ordered.

(Whereupon Plaintiff's Exhibit 54 was cross-referenced as Defendant's Exhibit 107; Plaintiff's Exhibit 51 was cross-referenced as Defendant's Exhibit 108 and Plaintiff's Exhibit 66 was cross-referenced as Defendant's Exhibit 109.)

Q. Mr. Fortner, the first transaction be-

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tween your group or your interests, and I am a little broad here on purpose because I am including Fortner Enterprises and Iroquois Developers, which you now controlled, and the Steel people involved one hundred eighty-seven lots, didn't it—not trying to trick you up—to refresh your recollection, the loan agreement?

A. Yes.

Q. Well, I mean, this is your recollection?

A. Yes, right.

Q. One hundred eighty-seven lots?

A. Right.

Q. When the lots were sold by Iroquois Developers to Fortner Enterprises was there a profit made on that transaction by Iroquois Developers?

A. I don't recall; the auditor could give you every bit of that.

Q. Well, he will be here, but I think maybe right now, let's look at Mr. Cooper's report dated April 24, 1961, which has a sales of lots sheet appended to it.

By the Court: Who is Mr. Cooper?

Mr. Reutlinger: Mr. Cooper is

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Mr. Fortner's auditor who was either a partner or em-



ployed the firm of Wetterer and Company, but Mr. Cooper is the one that signed the report, if your Honor please.

Mr. Anderson: May we see that; I don't believe you have designated it as an exhibit.

Mr. Reutlinger: No, I'm not going to offer it as an exhibit. You may see it. I just wanted Mr. Fortner to look at some of it.

Q. On this sheet which is part of this report over Mr. Cooper's signature dated April 24, 1961, which says it is a statement of operations of Iroquois Developers it has a chart showing the sales of lots, doesn't it?

A. Yes sir.

Q. And in two sections, doesn't it; the section up here of lots and then a section down here of lots (Indicating), one above the other; is that correct?

(No response)

Q. Do you see recorded a sale of twenty lots?

A. Yes sir.

Q. And you see reported below a—

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A. (Interrupting) A total, yes, one hundred eighty-seven.

Q. No, the total here (Indicating), yes, one hundred eighty-seven lots, and those one hundred eighty-seven are these figures added up, two, eighteen, seven, ninety-six—

A. (Interrupting) Yeah.

Q. So, apparently during this time covered by this audit, Iroquois Developers sold a total of two hundred seven lots and this is your grand total, isn't it?

A. Yes sir.

Q. And it sold in, apparently, one transaction because it is treated separately, twenty lots with which we are not concerned.

A. I don't know whether it was sold as one transaction or not.

Q. Well, all right; but we know it did sell this one transaction, one hundred eighty-seven lots to Fortner Enterprises, didn't it?

A. I don't know whether it was one hundred eight-seven at that sale or not.

Q. Well, let's look at a deed. You did acquire and you mortgaged to the Credit Corporation one

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hundred eighty-seven lots?

A. Yes sir.

Q. As the result of the first transaction?

A. Yes sir.

Q. In October of 1961?

A. Yes sir.

Q. And you got those one hundred eighty-seven lots from Iroquois Developers, didn't you?

A. Yes sir.

Q. And you got them all at one time by one deed, didn't you?

A. I think so; yes sir.

A. All right. Now, Iroquois Developers has to keep account of it's transactions, doesn't it?

A. Yes sir.

Q. And on this sale of lots, this report, I see one hundred eighty-seven lots, don't you?

A. Yes sir.

Q. All right. Now, with relation to those one hundred eighty-seven lots I see certain items such as cost of lots, commissions, other expenses, total costs, and profits; is that correct?

A. Yes sir.

Q. What is the listed profit on this state-

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ment of Iroquois Developers from the sale of one hundred eighty-seven lots? Does it read—





Mr. Anderson: (Interrupting) We would like to object, your Honor please; may we approach the bench?

By the Court: Overrule it.

Q. Does it read $39,204.87?

A. Yes sir.

Q. All right. Now, does it show a commission paid on this transaction involving one hundred eighty-seven lots; do you see this item right here? (Indicating)

A. Yes sir.

Q. Does it show commissions paid of $17,000?

A. Yes sir.

Q. Do you know to whom those commissions were paid?

A. I'm not sure, no.

Q. Wererent those commissions paid to Zettwoch-Fortner Corporation?

A. More than likely, but I'm not sure.

Q. More than likely?

A. Yes sir.

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Q. Who else was involved in this transaction other than Zettwoch-Fortner?

A. I said more than likely. I'm just not sure. I don't remember how it was divided up.

Q. Well, that is a pretty safe bet, isn't it? No one else—

A. (Interrupting) I said more than likely.

Q. No one else was in the transaction was there?

A. I can't remember anybody at the time.

Q. All right. So then, at the time you closed or shortly before, as you say, simultaneously, at the time you closed with the Steel people, Zettwoch-Fortner you believe—Zettwoch-Fortner—did I pronounce it properly?

A. (Witness nodded head affirmatively.)

Q. You believe obtained commissions on that transaction of $17,000?

A. Yes sir.

Q. And at that time you owned all of the Zettwoch-Fortner and were it's President?

A. Yes sir.

Q. And at that time Iroquois Developers, from which you were going to buy Mr. Robards out, so

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he had certainly a half interest in the profits, but at that time the profit to the Iroquois Developers Corporation was in excess of $39,000?

A. At what time?

Q. When you made this sale?

A. Before I bought him out or after?

Q. No, at the time this corporation sold these lots to the Fortner Enterprises—your other corporation, the Iroquois Developers made a profit in excess of $39,000, didn't it?

A. That's what that—

Q. (Interrupting) According to this statement?

A. Yeah.

Q. And you were it's—either a half owner or the entire owner of Iroquois Developers at that time?

A. Yes sir.

Q. And the money which paid the commission and the money which went to the profit was all borrowed from the Credit Corporation, wasn't it?

A. How was that?

Q. The money which paid this commission to the Zettwoch-Fortner and the money which was allocated

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to this profit all came from the Credit Corporation, didn't it?





A. Yes.

Q. Now, let's think a little bit about what you expected in this transaction. I think you have told us that you intended only to borrow money for the entire deal.

You intended to put up no money of your own; is that correct?

A. That is correct.

Q. And when I say the entire deal, do you understand that I am including land acquisition, land development, construction, the whole shooting match?

A. The entire deal to develop these lots and build U. S. Steel on 'em; this was the agreement.

Q. Well, I'm—all right. Now, to build U. S. Steel homes or to build any other prefabricated home would require you to have money for the other construction costs, wouldn't it?

A. It didn't in this deal.

Q. Well now, I don't—

A. (Interrupting) See, like I said yesterday, we would have never went to—

Q. (Interrupting) Mr. Fortner, we are not

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on the same wave length. I didn't mean you had to have money of your own. I mean you had to have money to pay your sub-contractor?

A. Yeah, but you're changing around what happened.

Q. I didn't say it happened. I think—

A. (Interrupting) The reason—the reason that we went to U. S. Steel Homes was that they wanted to put in all the money. We wasn't going to develop all of the subdivision at one time. We was going along—we would have went along on normal deals. We would have went with Empire or Conventional like we were doing, but they offered such a good, attractive deal, and who knows because

U. S. Steel would put out a house like they did, why, we got into trouble.

Q. All right; you told us yesterday—

A. (Interrupting) Yes, well—

Q. But what I'm trying to find out today is what you thought this transaction was with relation to the money required. Now, I am going to divide this up in three parts, Mr. Fortner.

The first part is the cost of acquiring the land. You believed because you have told us that the

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Steel people would lend you all of the money you needed to buy the land; is that right?

A. We had an agreement.

Q. Now, Mr. Fortner, I didn't ask you what your agreement was. I am asking you what you believed. We will get to what the agreement is in a moment.

What did you believe—did you believe that the Steel Company or it's subsidiary, the Credit Corporation would lend you all of the money you needed to buy the land?

A. Yes, because they told me they would.

Q. All right. Did you believe that the Steel Credit Corporation would lend you all of the money you needed to develop the land in case some of the lots were undeveloped?

A. Yes.

Q. All right. Did you believe that the Credit Corporation would lend you all of the money required to build houses on those lots?

A. Yes sir.

Q. Now, that money would include, as we know, the cost of the whole package, wouldn't it?

A. Yes sir.

Q. And would include, for example, the



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money you have to pay your independent concrete contractor, wouldn't it?

A. Whatever it took to build the house.

Q. Well, yes. I was giving this only by way of example.

A. Yeah.

Q. Now, would that loan include all of the necessary overhead, closing costs, things of that nature?

A. I don't remember how it was broke down. My auditor got everything, every figure and he would be glad to—

Q. (Interrupting) Well now, Mr. Fortner,—

A. (Interrupting) I can't remember how many pennies it included.

Q. I'm not asking that. I'm not asking you about pennies. I am asking in very broad outline.

A. We sat down with the U. S. Steel people and we figured out what it would cost to build the subdivision and what we needed. We went over the papers, went over the houses and that's what we came out with; that's what they lent me. They knew I wasn't putting any money in the deal.

Q. Now, Mr. Fortner, my question was did these projections include all of the money you an-

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ticipated you would need including overhead, closing—closing costs and things of that nature, and I'm not asking what the pennies were.

A. We—I assume they figured out that way because we didn't intend to put any money in it; that was the agreement when we built the U. S. Steel Homes.

Q. All right. That's kind of unusual not to put any money in the transaction?

A. Very unusual.

Q. But this certainly was your belief, wasn't it?

A. I believed we were borrowing enough to do the project and make a profit.

Q. And complete it?

A. Yes sir; or we wouldn't have bid it.

Q. And you would risk no money of your own or your corporation?

A. We were risking two years of time and our lots and a lot of things.

Q. Well now, all right; I'm asking you about money; would you risk any money?

A. Not cash.

Q. Right; and of course the lots you say

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you are risking are lots that you purchased from Iroquois Developers with borrowed money; isn't that right?

A. How was that again?

Q. I said the land, the lots that you say you were risking were lots you had purchased from Iroquois Developers with borrowed money, weren't they?

A. Yes.

Q. So that it wasn't your money invested in the lots, but it was the Steel Corporation?

A. The lots was worth more than that, but the appraiser appraised 'em for more than that.

Q. Mr. Fortner, if you answer my questions we will move along faster and if there is anything I have overlooked that is beneficial to your case, Mr. Anderson, I feel sure, will bring it out.

I think we can do better that way and certainly quicker. Now, your risk on the land was nothing because you had borrowed all of the money to buy and develop the land, hadn't you?



A. No sir.

Q. You had not?

A. Not all of the value.

Q. I didn't say the value; I said the risk.

A. I can't answer you the way you ask me

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because that would be lying.

Q. All right; let's put it on this basis then, Mr. Fortner, and maybe I can get it across.

A. It's across; you're just trying to make me say something that I—

By the Court: All right. Now, let's don't argue, Mr. Fortner; you answer his questions.

The Witness: I am doing my best.

By the Court: If you can't answer, say you can't.

Q. All right. If you say you don't know that's true I won't cross-examine.

A. Okay.

Q. Mr. Fortner, let's assume that you have a hundred dollars and the building and loan rate is five per cent or you go to a bank, put it in a savings account and then pay whatever the rate is, say five per cent, and you put that hundred dollars in the bank and at the end of a year you have got five dollars coming and you have your hundred dollars if the bank hasn't gone broke; is that right?

A. (Witness nodded head affirmatively.)

Q. Now, if I lend you a hundred dollars and

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you put it in the bank, you get the five per cent on my money, don't you, and owe me the hundred dollars don't you?

A. Yes.

Q. All right. Now, in this transaction what you are telling me you risked was not the cost of the land, but the

possibility and maybe the fact that the land had appreciated in value, but the actual cost of the land was based entirely on borrowed money, wasn't it?

A. What the enterprises paid for it, yes.

Q. All right. Now, what you are telling me also in this general litigation, this lawsuit, and of course I have been largely talking about the first transaction of one hundred eighty-seven lots, but what you are saying is, and conceding there is certainly the possibility of risking appreciation in land value, but what you are telling me is that you believe without investing any money or property over the course of a two year period and risking no money you would beget a return of approaching $200,000, or some $197,000, is that right?

A. I sure wouldn't have did it if we didn't believe that and it was worked out.

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Q. All right; what is that rate of return on the actual money you invested; can you figure that?

A. No.

Q. Pretty good, isn't it?

A. I assume it was.

Q. Yes sir. All right; now, I want to digress here for a moment. Well, maybe not; I think we will move right in on another area.

Now, actually, when you made this transaction for the Fortner Enterprises, this corporation was obligated to build U. S. Steel homes on these lots, that were bought and developed with it's money?

A. Yes sir.

Q. That is true, isn't it?

A. (Witness nodded head affirmatively.)

Q. We have blowups and as a matter of fact, we have never denied that was true, have we; kind of insisted on it all along?



A. It was in the contract. Every time we tried to build other types of homes so we would come out of the mess, why—

Q. (Interrupting) I understand that. Now, was there any reason in the contract or you couldn't—I'm speaking now only in the contract—why you

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couldn't pay us off and free the undeveloped lots from that restriction?

A. We were broke is why we couldn't.

Q. I didn't say that, Mr. Fortner. Now, if you will answer my questions, Mr. Fortner, as I phrase them, I am sure your lawyer will protect you later.

I didn't ask you if there was any reason, like you say you were broke, although I believe you told us yesterday that you were solvent and a going concern in May of 1962, but let's skip that.

Was there any contractual reason why if you could get the money—let's put it that way, that you could not pay off the loan and free the lots of this restriction?

Mr. Hamilton: I'll object to that, your Honor; that calls for a conclusion of law.

Mr. Reutlinger: Let's see what his understanding is, if your Honor please of the instruments before the Court there and in evidence.

By the Court: Well, I will just—the instrument is before the Court and the instrument provides that he had the right to pay it off

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at any time and free the lots of the restriction.

Q. All right. Well, that takes care of that—you don't have to answer that, Mr. Fortner.

Now, the instruments, these contracts, and there were four or five of them as we know, mortgage loan agreements and so forth, they don't or did not prohibit your Corpora-

tion from dealing with any of our competitors, did they, except on this particular land bought with our money?

A. I don't know. We were told we were a franchised dealer or something. I don't know what rights they had. Nobody couldn't build in a certain area or something.

Q. Well, that's protecting you. Did you read the franchise agreement before you signed it?

A. Yes.

Q. Now, I will ask the question once more and if Counsel wants to say the instruments speak for themselves I am perfectly willing to have that and let the Court make an interpretation legally or, Mr. Fortner, you can answer this on the basis of your understanding.

We know and have told you from the start there is no dispute about it that for all of the land you

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bought and developed with our money you had to put our houses on; now, that's true, isn't it?

A. That's right.

Q. Is there anything in these contracts which would prevent you, if you could, from buying other land and putting our competitors' houses on it?

A. I don't know. The records says—

Mr. Anderson: (Interrupting) We will stipulate that, your Honor please.

Q. It is agreed by your Counsel that there is no provision against you, your Corporation, buying the lots next door and putting somebody else's house on it.

A. Next door to the subdivision?

Q. In that subdivision.

A. They had all of the lots in that subdivision.

Q. Are you sure, Mr. Fortner?

A. Yes.

Q. Positive?



A. They borght one hundred eighty-seven and thirty-two, which was the balance of two hundred nineteen.

Q. Yes sir; and there were none left unmort-

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gaged?

A. To my knowledge.

Q. Would someone else have a record on that?

(No response.)

Q. I said, do you have any other records which would show what you mortgaged to us other than what we have before the Court today, mortgage loan agreements?

A. I don't have any other records.

Q. Could you be mistaken and could there be four or five lots not mortgaged?

A. I can't remember if they were. I assumed that, uh—

Q. (Interrupting) Well, you're speaking now from assumption?

A. Yes.

Q. And if the records disclose in fact, that there were three or four lots not mortgaged and, hence, not restricted, you would abide by those records, wouldn't you?

A. Sure.

Q. All right.

A. I just don't recall.

Q. Well, Mr. Fortner, don't misunderstand

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me; I know it's been ten years ago and while you and I are both intimately associated with it you really have the advantage over me because I didn't get into it until 1962 and you started with it; that's about right, isn't it?

A. I doubt if I have the advantage over you.

Q. Well, I don't know. You certainly started with it and lived with it and I had to get it secondhanded.

All right; in any event, there is no reason, legal reason, why you had to build U.S. Steel Homes on any property not

mortgaged and there is no legal reason why you could not pay off the mortgage and release the restriction. Now, we will proceed on that premise.

Now, let's look at and this time we are only going to talk about the first loan agreement although I can assure you that the second loan agreement is identical and if you like we will examine it.

The first loan agreement, as we know, covered one hundred eighty-seven lots and was executed in October of 1961. Mr. Anderson has offered it, but I would like you to look at the original which we have tendered and ask you if you would, just glance at every page and

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see if those aren't your initials and your signature and so on, on that document which I hand you and which I offer in evidence as Defendant's Exhibit No. 7.

By the Court: Let it be filed.

(Whereupon Defendant's Exhibit No. 7 was received in evidence.)

Q. That is the original loan agreement isn't it, or certainly a copy of it—a counterpart of it?

A. I assume it's the original.

Q. Well, you don't—it has got your signature on it?

A. Yeah.

Q. I mean it's not a picture or anything.

A. No.

Q. Okay. All right; that's a fair assumption then; it's the original if it's not a picture?

A. Yes, just my way of expressing it.

Q. I'm sorry. I didn't—now, Mr. Fortner, if you look at the first page right under the phrase "Witnesseth", which I have trouble pronouncing, the second paragraph down there reads like this;



"Whereas, the Premises have been sub-

(Vol. IV, p. 79)

divided, or will be subdivided into approximately one hundred eighty-seven lots, which Borrower intends to develop by the installation on one hundred fifty-seven of said lots of necessary land improvements, and to construct on each of said one hundred eighty-seven lots of said lots single-family dwellings utilizing products of the U. S. Steel Homes Division, United States Steel Corporation."

So, we are dealing with the one hundred eighty-seven lots, aren't we?

A. That's right.

Q. Now, I want you to pick up that paper again, if you would, and let me help you find it. Now, Mr. Steinfeld looked it over before you signed it, didn't he?

A. Yes sir.

Q. And I'm going to read to you and you can follow me and I know Mr. Anderson is, some language in Part "C", Section 1, Page 6, and you tell me if I misread it, Mr. Fortner.

"For the purpose of allocating the proceeds of Construction Note No. 1 and Construction Note No. 2 to be granted to Borrower hereunder, the maximum amount of such proceeds to be allocated to each of the

(Vol. IV, p. 80)

proposed lots—"

Now, let me stop right there. They are talking about advancing and allocating sums to lots by units, aren't they?

(Witness nodded head affirmatively.)

Q. Is that right?

A. Yes.

Q. All right.

"—covered by this agreement shall be, as to each sub-lot, whichever amount is lesser of either that amount set forth in Column 3 on Exhibit B—"

Which we will come to a moment, and I emphasize the word "Lesser" there;

"—or that amount arrived at by subtracting the pro-rata share of the proceeds of the land notes allocated each of said sub-lots as set forth in Column 2 of said Exhibit B."

Now, isn't what they have said there that they will lend you the lesser, the smaller of the sums? So far that is what they have said, of a figure on the chart which we will come to, or subtracting from that figure the land costs based on the money loaned; isn't that what they have said, in essence?

A. I believe so.

**(Vol. IV, p. 81)**

Q. All right; and then they go on and they have given you a figure and a means for acquiring a lesser figure and let me pause here one more time.

In each of these one hundred eighty-seven lots you had borrowed money, so each lot has a land note allocated to it, doesn't it; a portion of it?

A. I believe that's right.

Q. All right.

"From—"

And here is something I want you to consider very carefully:

"From eighty-five per cent of the evaluation of the particular house and lot established by the F.H.A. as the basis for the commitment to insure issued therefore."

Now, isn't what that contract has said there that they will lend you up to a top figure because we know you were



building within a range of prices, but they will lend you what the F.H.A. appraisal of any particular house and lot is, less the loan or the pro-rata share of the land note with eighty-five per cent deduction on it; isn't that what that says?

A. I think so.

Q. You think so?

**(Vol. IV, p. 82)**

A. (Witness nodded head affirmatively.)

Q. All right. Well, I must say I agree with you.

Let's then work by way of illustration. Now, you have told us in your deposition and you have told us in your testimony of yesterday that the B-1 slab priced $11,400, was a standard from which you made, you and Mr. Miles and your accountant, made certain projections; is that correct?

A. We raised the price to that figure.

Q. I understand that, but didn't you tell me when we took your deposition, and incidentally you neglected to tell me that when we took your deposition, didn't we?

A. I don't remember.

Q. Don't remember. Let's see what you said; pretty near have to get that down; it's Page 48, and this deposition is the same one I referred to earlier. It's at the bottom of the page, yeah:

Q. That's what I was driving at was your projection, this $900. Was that based on the B-1 model only without variations; did you understand that?"

And did you make this answer to that ques-

**(Vol. IV, p. 83)**

tion at that time:

"A. We projected no less than $900 on them all and had it figured it in that some of the higher models would make more.

Q. You projected only the B-1?

A. We just used that as a standard all the way through."

Now, did you make that answer to that question at that time?

A. That's the way we arrived at the $900.

Q. Yes, all right; and I'm speaking of the B-1 slab; I am speaking of this, wasn't I?

A. You said all of them, I thought.

Q. No, you said all of them in your answer, this is you speaking now:

"A. We just used that as a standard all the way through."

Did you make that answer to that question?

A. Yes, yes.

Q. All right. Now, with regard to the $11,400 figures, now, on Page 58:

"Now what was your suggested or what was your selling price for the B-1 slab house?

A. $11,400.

(Vol. IV, p. 84)

Q. This was the gross sales price, right; this may seem facetious to you, Mr. Fortner, but we do have real laymen on the jury; this including the house and lot, the $11,400?

A. Right."

That was your answer; did you make those answers to those questions at that time?

A. Why, yes, if it's in there I made it.

Q. Well, it is in here. Now, I'm not trying to labor the point, but I'm trying to pull it out of you. I am using the B-1 slab as an illustration for this eighty-five percent loan and only by way of illustration.

I assume you got the full F.H.A. appraisals on your suggested sale price and as a completed unit, didn't you?





A. Yes.

Q. So that if you had completed a B-1 slab and the F.H.A. has approved it and if you priced it at $11,400 like you tell me, then you would get an estimated F.H.A. evaluation or appraisal of $11,400, wouldn't you?

A. Yes.

Q. Then, the first thing that would be done

(Vol. IV, p. 85)

is to take eighty-five per cent of that value to give you initially the maximum amount you could borrow on this B-1 slab lot; isn't that right?

A. That's right.

Q. And if, and here you can get me if you want to, if my arithmetic is right, eighty-five per cent of $11,400 is $9,690; is that right?

A. I take your word. I didn't figure it; I haven't figured it.

Q. Mr. Fortner, I know I haven't. I am being a little facetious myself. You don't have to take my word for the arithmetic. I would rather have Mr. Hamilton check me. Let's put some of this on the board. I want to finish up first and the next thing in this particular transaction, I'd like you to look at that schedule "B" attached to it, the land note allocation which is $1,720; is that right?

A. That's right.

Q. All right. Now, what happens according to this loan agreement is that on a B-1 slab, F.H.A. at $11,400, we first take eighty-five per cent of that which gives a figure of $9,690.

Then, because you have borrowed the money for the land, they deduct under this schedule in the con-

(Vol. IV, p. 86)

tract you hold in your hand which you signed the 28th day of October of 1960, money which you already have gotten

because that is where the land money is, isn't it, borrowed money; that right?

A. You gave me—you're getting me quite confused.

Q. Well, I don't mean to confuse you.

A. I know you don't, but you are.

Q. You have been in business for twenty years. The money to buy the land was borrowed from the Credit Corporation, wasn't it?

A. Right, sir.

Q. So, having lent you that money in the loan agreement they tell you they are not going to lend it to you twice, so they are going to deduct the money they have loaned when they made the construction loan, aren't they?

A. Yes.

Q. All right; and the figures given in that document which you signed, that figure of $1,720 is the figure so that on any given B-1 slab transaction, which is the one you projected, the one we are using for illustration, again if my arithmetic is right you could expect to borrow $7,970, which of course is

(Vol. IV, p. 87)

exclusive of land because the land is already up there.

Now, that is what you could borrow for the construction, closing, overhead and other costs, isn't it, the maximum on a B-1 slab at $11,400; that's right, isn't it?

A. Assume that's right.

Q. Well, I'm glad you say you assume my arithmetic is right because I am not sure myself, but certainly the concept is accurate, isn't it?

A. (Witness nodded head affirmatively.)

Q. Can you explain to me, Mr. Fortner, how you can tell us that this is a one hundred per cent loan when the document you signed calls it an eighty-five per cent loan?

Mr. Anderson: If the Court please, again, the docu-



ment speaks for itself. He is now talking about the construction money.

Mr. Reutlinger: Yes, I am.

Mr. Anderson: And Mr. Fortner's testimony about the hundred per cent loan was on land acquisition and development.

By the Court: Well, I overrule the objection; he can explain it.

Q. I didn't recall the testimony that way.

(Vol. IV, p. 88)

I thought you told us that you were going to get all your construction money, overhead, everything?

A. Well, it, as you know, has been a long time. I haven't gone over any of those figures since then.

Q. You didn't go over these figures yesterday with Mr. Anderson?

A. Not like you are doing it.

Q. Well, you went over the figures though, of course?

A. I went over what figures he showed me, yes.

Q. I see; all right.

A. And we have an audit of just exactly what happened to every house.

Q. Mr. Fortner, that wasn't my question at all.

A. And I am not an auditor and I can't, uh—

Q. (Interrupting) This—I'm sorry, you misconstrued my question entirely. As I remember—as I recall it your testimony earlier today and as I recall it your testimony yesterday, and I think maybe I better refer to your deposition which you gave me in

(Vol. IV, p. 89)

preparation for the trial, you told me repeatedly—told this jury repeatedly that you did not expect to put any money in this transaction; that it was a hundred per cent financing. Now, didn't you tell me that?

A. Yes.

Q. All right. Now, you have also told us, Mr. Fortner, that you were represented by one of the ablest lawyers in Kentucky who now sits on our high court; that you hired auditors throughout this transaction; that Ed Horn has been in the mortgage loan and financing business for twenty-some-odd years and he has been associated with you off and on during that time and he was brought into this transaction at your request.

Mr. Anderson: If the Court please, I'll object to Mr. Reutlinger's speech.

By the Court: Overrule it.

Mr. Anderson: It is not in the form of a question.

By the Court: Well, the jury will have to remember whether or not the attorney has actually covered what has been testified.

Mr. Reutlinger: That is their province, yes sir.

(Vol. IV, p. 90)

Q. Uh, then I refer you to the document which says that they will give you eighty-five per cent of the appraisal value less the amount of the money which they have already loaned you.

Now, can you tell me—I don't understand it—how you can on one hand say this was one hundred per cent financing and on the other hand—

A. (Interrupting) Well, that—

Q. (Interupting) Wait just a minute, Mr. Fortner; let me finish my question; and read to me from the documents and tell me from that stand that you signed a paper with all this advice around you which says it is only eighty-five per cent; can you explain to the jury?

A. That's on the construction part and this was a profit I assume, and all that was to add on to that and that's all we needed and that made it a hundred per cent of what we actually needed.





This is—I'm assuming now because I don't have all of the figures of the house breakdown.

Q. Well now Mr. Fortner, how long have you known that this case was set for trial on June 1st of this year?

A. Oh, it's been quite a few months.

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Q. This is no surprise to you that we are here today?

A. No sir.

Q. All right. You did expect to be cross-examined on some of this?

A. Yes sir.

Q. Some of this material, didn't you?

A. Yes sir; but I assume myself that the auditor, when you get into figures will handle it.

Q. Mr. Fortner, this is your lawsuit; not the auditors' province.

Mr. Anderson: I again object to the statements of Counsel, your Honor.

Mr. Reutlinger: I'm sorry, I apologize.

By the Court: All right.

Q. Now, Mr. Fortner, without going into the extent of what took place, and I might hasten to add I am sure Mr. Anderson would not put you on this stand without discussing with you the testimony, the figures, last week and early this week, you spent a lot of time with your lawyers going over figures and this case generally, didn't you?

A. Yes.

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Q. All right; I mean I'm not being critical.

A. I'm still not an auditor.

Q. I know you're not an auditor, but you are highly successful in real estate, aren't you?

A. Well, I am glad you think so.

Q. In any event, you know the difference between a hundred per cent and eighty-five per cent, don't you?

A. Yes sir.

Q. And that is fifteen per cent?

A. Yes sir.

Q. All right. Now, how much profit, by percentage if you can tell me, did you expect to make on this transaction?

A. The entire?

Q. Yes.

A. We never did figure up for a total; we tried to figure what we would make on each house and that would give us then a total.

Q. I am speaking of projection now of this B-1 slab. I have had someone helping me with the arithmetic and I will let Mr. Anderson check me. We are speaking now—as I understand your testimony of

(Vol. IV, p. 93)

yesterday regarding the profit and percentages we projected in the B-1 slab model—you used that as a guideline?

A. Yes, I think you can figure it out there. Isn't it on that sheet there?

Q. Yes sir; but I mean does it give a percentage; did you figure a percentage yesterday?

A. You've got it on the figures.

Q. Well, I'm going to give them to you if you will be patient just a moment, by a fellow who claims he can figure and we will let Mr. Anderson check them. Now, assuming, and mind you, Mr. Fortner, I don't concede this, but assuming that your projection validly shows a profit of—or, an anticipated profit of $900—and I'll draw a line across here, and this is Fortner Enterprises Incorporated, on a $11,400 transaction, you told us yesterday you expected a profit of $900?

A. I believe was better than nine; a little better than nine.

Q. Oh, Mr. Fortner, don't fudge on me; I think it ended up $900.



A. That's the way it ended up, gross profit up there?

(Vol. IV, p. 94)

Q. Yes. Well, there is a difference between gross and net?

A. Yes, that's right.

Q. All right; net profit. You don't claim you are entitled to your gross profit, do you?

A. It's nine hundred.

Q. Nine hundred; all right. Now, if Mr. Rollins' arithmetic is correct, and I urge Counsel to check him, and I can't do it that quickly, but a $900 profit—the sales price here and put the profit here and that is a percentage of 8.1—well, 7.9, and can we round it off to eight per cent for everyone's convenience; this is a profit of eight per cent.

Now, you and I both know that you don't have to put up any money for profit; that's something you get when you make the sale, don't you?

A. Generally.

Q. Well, if it's a profitable transaction.

A. Generally.

Q. Well, this transaction for this illustration has a profit of $900 then?

A. Right.

Q. Now, the difference between your hundred per cent financing and your eighty-five per cent

(Vol. IV, p. 95)

financing which is, you say, a hundred per cent, but then this morning you tell me you really signed a paper with advice and expected only to obtain this figure which is eighty-five per cent—no, I'll just put loan agreement here (Doing so).

Now, you don't have to have any money to give you the eight per cent profit because you don't need any money for that until you make the sale, do you, but there is seven per cent somewhere in here between the sale price and the

profit—there is other money because this $900 is only eight per cent of that. The rest is costs or overhead of some kind; it has to be; isn't that true?

A. That's true.

Q. What did you say; I didn't hear you?

A. It's true.

Q. True. Now, and the overhead costs are going on all the time as you construct, aren't they?

A. That's right.

Q. Where does that money come from?

A. It depends on the set-up where you have it.

Q. Well, where did you propose to have it come from in this transaction?

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A. Well, this is where you're getting so far off now; U.S. Steel and I sat down and we figured this out. It all worked out. We had plenty of money and we considered it a hundred per cent loan. It was, and everybody was happy and if we could have built the package, why, we wouldn't have been here.

Q. Mr. Fortner, my question—

A. (Interrupting) This seems to me so far away from what the trouble is, you know.

Q. Well now, what the trouble is, is for the jury to decide and as far as you are entitled to—have already and no doubt will bolster your position on what the trouble was, but right now I'm trying to get some of the finances straight in my mind.

A. Then we ought to get the auditors and take his books and you get it penny for penny.

Q. I have got that. We will come to that in a little bit, but I want to find out what your—

A. (Interrupting) We—we had an understanding at the time. It's been eight years and—

Q. (Interrupting) I understand, but remember, no



matter what the auditor says, he is not going to put any money in it or lose any money by it, is he?

A. That's right.

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Q. This is Fortner Enterprises?

A. That's right.

Q. All right. Now, can you tell me when—you knew when you signed this paper that you were only to get eighty-five per cent—

A (Interrupting) Well, we signed the paper.

Q. Wait just a minute; let me finish my question; and that you knew when you signed that paper because you told us yesterday you had made your projections, you had used B-1 slab and you went into it in detail yesterday that you were going to have a profit of $900 as a normal—as a standard; can you tell me where this seven per cent with an overhead was going to come from; not from us; we made our committment.

A. I don't know without checking the records and getting my auditor just how we had it all planned out.

Q. Where did you think it was going to come from?

A. We never had that large of an overhead setup and some of the overhead was set up in the figures.

(Vol. IV, p. 97(a))

Q. I'm sure you didn't have it set up, but I'm coming to that in a minute.

A. Yes.

Q. But maybe this is where you made a mistake. If you don't know, Mr. Fortner, simply—

A. (Interrupting) The interest speaks for itself, Mr. Reutlinger, where I made a mistake, where I paid.

Q. Well, we will get into the financial aspects of it, but regardless, at the kickoff, the first date, the first sale, the first B-1 house you sold for $11,400 you knew you were

going to make a profit of $900 which did not have to be financed.

You knew you were only going to get an eighty-five per cent out of a hundred per cent. What provision did you have for this seven per cent here and if you don't know, say you don't know.

A. I don't know to the penny.

Q. All right; you will concede it had to come from somewhere.

A. I can't agree to something I don't know.

Q. I didn't say the amount; it's a per cent.

A. Something had to come, yes.

Q. It wasn't going to come from us, was it?

(Vol. IV, p. 98)

A. No, we had it all worked out. We got—

Q. (Interrupting) I say, it wasn't going to come from us, was it?

A. Not any additional, no.

Q. All right; now, the reason I have kind of hammered—well, maybe we better talk a little bit before we get into that about this particular corporation.

Mr. Anderson touched on it yesterday and I am frank to confess that I am not certain whether you stated it from the stand, uh, the financial position of this corporation immediately prior to this transaction, and I'm speaking now not of the corporate powers, but the financial condition, I believe it had a deficit of $16,000 and some-odd; is that right?

A. I believe that's right; yes sir.

Q. Do you know how your corporation got in such a bad shape?

A. This corporation, when it was—uh, I believe that was a deficit left over from the Gold Rose Gift Shop and that was just what I said it was, a gift shop.

Q. Didn't work out too well?



A. The other party was running it and it

(Vol. IV, p. 99)

didn't work out too well so we had to close it.

Q. I will show you a balance sheet for June 30, 1960, which shows a deficit of $16,000 and some-odd hundred?

A. Yes sir.

Q. Now, this is the corporation that you are using for this enterprise?

A. Yes sir.

Q. This joint venture, right; and I will offer in evidence the corporation tax return for the Plaintiff for the fiscal year ending June 30, 1961, and ask that it be marked as Defendant's Exhibit 9-A.

By the Court: Let it be filed.

(Whereupon Defendant's Exhibit No. 9-A was received in evidence.)

Q. Now, Mr. Fortner, a corporation, from a business standpoint is just like a person, isn't it; I mean you can do business with a corporation?

A. Yes.

Q. You yourself know, being a business man, that sometimes, as you say—you had some rental properties in the West End and in the South End in your own name?

(Vol. IV, p. 100)

A. Yes sir.

Q. And I believe this corporation, by coincidence, though it has no real bearing on the case, had a couple of pieces of rental properties in it's own name?

A. Could have.

Q. Well, certainly could have?

A. (Witness nodded head affirmatively.)

Q. Now, I know this is not true, but assume that you owed—you, A. B. Fortner, Jr., personally owed $16,000 more than you had assets; do you think any bank would lend you money?

A. That's why we took the U. S. Steel; they did.

Q. Now, Mr. Fortner, I am speaking now of A. B. Fortner, the man, not the corporation; I am speaking of you personally.

A. I doubt it.

Q. So do I; and as I say, I am not trying to run you down, but no banker in his right mind would do that, would they.

(No response.)

Q. Now, knowing that a corporation is just like a person, you had a corporation here which owed

(Vol. IV, p. 101)

$16,000 and some-odd hundred more than it's assets, didn't you?

A. That's right.

Q. And you did not, as I understand it in this transaction, personally endorse the corporation's note?

A. The U. S. Steel notes?

Q. Yes sir; when I say personally endorse, I mean you didn't guarantee that if the corporation didn't pay you would pay?

A. No sir.

Q. You carefully avoided that, didn't you?

A. That's why I have a corporation.

Q. Well, I understand that. Listen, I'm not being critical of that. I think that's a very useful way to transact business.

A. Of course, U. S. Steel knew all about the sixteen. We agreed to use this corporation so we could get a fresh start.

Q. Absolutely, they knew. I am not implying that you ran in and said, "I've got a big corporation, and lend me money."

They knew; you knew they knew; I knew they knew, but what I'm trying to establish is you did not



(Vol. IV, p. 102)

endorse or guarantee any of these corporation's debts, did you?

A. No sir.

Q. Now did you permit or have anyone else, including your other corporations, endorse this paper, did they?

A. No sir.

Q. No one was liable—nothing, nor corporation was liable except for Zettwoch—s. ike that; except Fortner Enterprises?

A. That's right.

Q. The only one, and it went into the picture with a $16,000 deficit?

A. Right.

Q. Insolvent?

A. Right.

Q. All right. Now, at that time you already told us you had the Fortner Homes and you did not tell me because you said you weren't able to, uh, what his financial status was or whether it was dormant or not.

You had Mr. Robards and Iroquois Developers and you certainly had Zettwoch-Fortner available and perhaps other personal resources.

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You did not choose to use any of those to either guarantee or put up money as to Fortner Enterprises in this transaction, did you?

A. No sir.

Q. Nor did you at the time this transaction was closed, or when it was threatened with foreclosure use any of those corporations which you had resources on, and by that time, Iroquois Developers you owned wholly and this had profit in it, you did not use any of those to lend money to Fortner Enterprises to release the mortgage, did you?

A. No sir.

Q. And as the Court has already told us, had the mortgage been released you were free to move in this particular corporation—

Mr. Anderson: (Interrupting) May we approach the bench, your Honor; we would like to be heard in chambers on this.

(Counsel approached the bench at this point.)

Mr. Anderson: We would like to be heard on this question of the Court's interpretation of the contract on which the Court has made admonition to the jury.

(Vol. IV, p. 104)

By the Court: All right, I will hear you at one o'clock then.

Mr. Anderson: May I hear the last question Mr. Reutlinger was asking?

Mr. Reutlinger: I really hadn't finished it, but go ahead and read it if you would, please?

(Whereupon the preceding question was read by the reporter.)

Q. And at that time what was the apparent, and I certainly don't care for exact figures, financial status of Zettwoch-Fortner Corporation—solvent?

A. Solvent, yes.

Q. A going concern?

A. Going concern.

Q. And as a matter of fact it has grown since, hasn't it?

A. Yes.

Q. How many branches do you have now, Mr. Fortner?

A. Two.

Q. And at that time was Iroquois Developers solvent and a going concern?

A. It was solvent, but wasn't—

(Vol. IV, p. 105)

Q. (Interrupting) It might not have been active?





A. No, I don't think it was active.

Q. It had assets, didn't it?

A. I think so.

Q. All right; and at that time did the Fortner Homes have assets; was it solvent?

A. Solvent.

Q. And I'm not trying to pry deeply into your personal affairs, but at that time did you regard yourself personally, or you and your wife together if you keep your property in joint names as having some substantial assets?

A. That's right; yes sir.

Q. And that would include a home, for example, on which you could borrow money if it wasn't already mortgaged, matters of that kind?

A. I was solvent.

Mr. Anderson: If the Court please, now, we would object to all of these questions about solvency and insolvency, the other corporations of Mr. Fortner, and move to strike.

By the Court: Overrule it.

Q. I will ask you one other thing which is

(Vol. IV, p. 106)

an abrupt departure from what I have been doing here, and ask you where you sought other financing, if you did in fact, seek it, prior to making your transaction with the Credit Corporation in October of 1961?

A. Financing for what?

Q. This project.

A. We didn't try to get any better financing than that.

Q. Well, you could hardly—

A. (Interrupting) We—we weren't even thinking about U. S. Steel Homes until they come along with the deal.

Q. I thought you said you sent Mr. Edmondson over there?

A. I say, we didn't think about finances or anything; we knew we couldn't get any better or as good so we didn't go any farther.

Q. So, you really then made no inquiry in the local market?

A. Not on that deal. We had been fooling with the local market for years; we knew what it was.

Q. Well now, what aspects of the local market had you been fooling with? Where had you made inquiry say within six months?

(Vol. IV, p. 107)

A. We were always financing.

Q. Mr. Fortner, just let me finish my question. Where had you made inquiry and to whom and on what approximate date regarding this type of financing, as you say, a hundred per cent, and I say, eighty-five per cent six months prior to this transaction?

A. We had talked to, uh, Empire Homes and we had talked to Ed Horn and possibly to two or more of the mortgage companies. I don't recall at the moment.

Q. Do you recall who you talked to at Empire Homes?

A. I think the fellow is dead. I can't call his name even, but he left us a bid and all this and that.

Q. I'm speaking now, Mr. Fortner—

A. (Interrupting) Of finances?

Q. Yes, and before this transaction and not in 1962. I'm speaking of at a time six months prior to October, whatever it was, 28th, 1960?

A. We were inquiring during that time all the time.

Q. Where, to who?

A. Louisville Mortgage; in fact we closed a big loan with Louisville Mortgage for part of this

(Vol. IV, p. 108)

property.





Q. Did you ask them if they could arrange for a hundred per cent financing on this property?

A. I didn't ask 'em. I knew better than that; they'd turn you down at seventy, seventy-five.

Q. You didn't ask them?

A. No, didn't.

Q. Who did you ask?

A. I didn't ask nobody to borrow a hundred per cent. I asked 'em to borrow on seventy and eighty and I was turned down.

Q. Did you ask to borrow seventy or eighty on this transaction?

A. No, not on that transaction; that's all I needed. Why should I go somewhere else?

Q. That is exactly what I thought you ought to say, that you really and truly, from the word go, because you told us so, thought you had a hundred per cent financing.

A. We had what we needed if the project would have went like it should.

Q. That's right; you didn't shop around at all, did you?

A. No reason for it.

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Q. All right. Well, I suspect that's right; that's what I was driving at all along.

A. That's right.

Mr. Reutlinger: If your Honor please, I have an extremely lengthy other section of my cross-examination and would prefer with the Court's indulgence to reserve that until we come back after the noon recess.

By the Court: All right; it's ten minutes till twelve. Ladies and gentlemen; we will take our lunch period and be back in your seats at one twenty and remember the admonitions of the Court.

(Whereupon at about the hour of 11:50 A.M. a luncheon recess was taken, reconvening at about the hour of 1:05 P.M. in chambers of the court and the following proceedings occurred:)

By the Court: All right.

Mr. Anderson: Your Honor, the Court in the course of proceedings this morning when Mr. Reutlinger was asking Mr. Fortner a question

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concerning the loan agreement, uh, Defendant's Exhibit No. 7, asked Mr. Fortner what we regarded as an interpretation of the language agreement and we therefore made an objection to that question and the Court, uh, then admonished the jury and I don't know whether the Court was telling the jury that the loan agreement itself provided that, uh, the tie-in provisions were released, uh, if the loans were paid off, or whether the Court was admonishing the jury as a matter of law that the tie-in agreements or provisions were released if the loans were paid off.

In other words, I don't know whether the Court was telling the jury that this is what the document said or was telling the jury this is a matter of law.

We, uh, respectfully submit that the loan agreement does not contain any provision which allows for release of the tie-in provision by payment of the loans.

We call the Court's attention to, first, on the second page of that agreement, uh, Paragraph 2-B which reads:

"The borrower agrees to do and perform the following acts and

(Vol. IV, p. 111)

things:

To complete the development of premises and to erect on each of said lots, free of all mechanics'



liens, a prefabricated dwelling house manufactured by the United States Steel Homes Division, United States Steel Corporation—"

And the paragraph goes on with some other provisions about constructing, installing improvements in accordance with development of contract and so forth.

Now, that same document at page 7, under Part "D", Paragraph 1 provides:

"An individual written release of lien of mortgage from the U. S. Steel Homes Credit Corporation for each of the lots duly and regularly platted within the premises described in said mortgage shall be prepared in proper form and deposited with the Title Company within sixty days from the date of said mortgage. Upon proof that the Shell

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of a prefabricated single-family dwelling house manufactured by the United States Steel Homes Division of United States Steel Corporation has been erected by or upon any given lot, the applicable release of lien of mortgage shall be placed on record in the records of Mortgages for Jefferson County, Kentucky, upon payment by borrower to Title Compay for the account of lender:

(A) The sum of $2,200. to be applied first to reduction of principal of Land Note No. 1 until said Note is paid in full, and thereafter to reduction of principal of Land Note No. 2;

(B) An amount aggregating that portion of the proceeds of Construction Note No. 1 or Construction Note No. 2, and interest accrued thereon, which has been advanced to finance construction of a dwelling on said lot, for application to reduction

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of principal of Construction Note No. 1 or Construction Note No. 2, whichever is applicable."

Now, Paragraph 2 on the last page of this loan agreement under Part "B" provides:

"This agreement, together with the notes and mortgage hereinabove described, constitute the entire agreement between the Borrower and the Lender and no representations or agreen , express or implied, have been made to or with the Borrower not herein contained. This agreement shall not be amended or modified nor may any of it's terms or conditions be waived, except by an instrument in writing executed in the name of and on behalf of the Lender by one of it's officers thereunto duly authorized."

Now, if the Court please, we submit that this document does speak for itself; that it does not provide for a release of lien upon payment, but is a multiple-conditioned document and that one of the conditions, of course, is the tie-in arrangement which I read and

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we respectfully submit that, uh, there is nothing in the document nor in any of the documents which unequivocally provides for release of the mortgage lien and release of the conditions of the loan agreement, uh, provisions of the loan agreement by payment of the sums.

The document is permeated with the consideration for the loans being security given and the other conditions, including the tie-in arrangement.

By the Court: Well, as I understood the question to the witness from Mr. Reutlinger, it was:

"Was there ever anything to prevent you from paying the indebtedness owed to us and then constructing



any type of a structure you wished to construct on each of the lots in this Subdivision?"

Mr. Anderson: Was there ever anything legal to prevent him?

Mr. Reutlinger: Financial, legal, that's right. He answered something about finances and I had to get around—

Mr. Anderson: (Interrupting) The question was, and he was referring to the loan

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agreement and the question was, was there ever anything legal in that agreement that kept him from doing that.

By the Court: Well, and as I understood it, then there was an objection from Mr. Hamilton that the documents spoke for themselves.

Mr. Reutlinger: That's right.

Mr. Hamilton: Yes. Here is what—

By the Court: (Interrupting) Is there anything in those documents that prohibits the borrower from paying the debt owed, the remaining balance at any time?

Mr. Reutlinger: I can answe, that; the notes are on or before.

By the Court: Because I referred to that in my original opinion.

Mr. Reutlinger: If I may, and I was told never to interrupt the Court when the Court was working with you, but there are several factors here which Counsel has neglected to mention and at this point perhaps the record is incomplete simply because I am uncertain whether the mortgage has been made part of the exhibits, but I can assure you if not, we will

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make the mortgage part of that.

Now, as Mr. Anderson read to the Court a moment ago, correctly, from the loan agreement, it was cited that this

contract—this loan agreement and mortgage and the note are all part of the transaction.

You have three documents; a note and mortgage which formed a transaction. This precise, same argument Mr. Anderson makes to this Court today was made to the Sixth Circuit by Mr. Anderson without the first case to support him.

We took the position that when the mortgage was paid or restrictions were removed, obviously, the land being in Kentucky, Kentucky law applies, and cited—I've forgotten, oh, four or five cases which held that when you paid your mortgage restrictions are loose, but more to the point, if your Honor please, it is not in the record yet, but will be I can assure you, that in three or four instances, upon the pro-rata payment for the land only, the $2,200, or whatever the pro-rata is, that piece of property, that lot was released from mortgage and the release was executed and put to record and Mr. Fortner knows it and I know it and of course under the doctrine of contemporaneous construction it was completely released.

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Finally, as the document recites, Borrower has to do all these things, but once he has paid his note he is no longer a Borrower. It is as simple as that.

Mr. Hamilton: If the Court please, may I put my oar in this creek? The short period of time that we had between—right after lunch, I must admit relying upon the Corpus Juris and not the cases, but I will certainly brief them if the Court would like and, uh, if I may read this, it says that where a mortgage is conditioned otherwise than for the payment of money or is stipulated to be satisfied or released on the performance of some particular condition, due performance of the condition discharges the mortgage by operation of law.



This is the case, for example, with a mortgage conditioned for the support and maintenance of the mortgager for the erection of a building according to specifications, or on the remarriage of the parties, where a mortgage is given to secure both the payment of money and the performance of a condition; such mortgage is not discharged by the payment of the money without the fulfillment of the condition.

A mortgage conditioned to become void on

**(Vol. IV, p. 118)**

the occurrence of a future event other than the payment of a debt secured or, as an alternative, for such payment is discharged by reason of law and the happening of the contingency provided for and conversely, the mortgagor is bound where the condition is not formed.

Mr. Reutlinger: The mortgage conditioned only on money—loan agreement is the one he is complaining about.

Mr. Hamilton: The loan agreement is the mortgage, Mr. Reutlinger.

Mr. Anderson: It is incorporated into it.

Mr. Hamilton: And I would like to say that I believe later on in the case it will be shown, your Honor, and I think one reason it was put in there and had this case, or had this project taken a different turn they may have raised this point; I think that mathematically we will find that the debt would be paid off prior to the construction of a U. S. Steel House on each and every lot because they are getting $2,200 and that is the reason—

Mr. Reutlinger: (Interrupting) Then you are free.

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Mr. Hamilton: (Continuing) For the restriction in this loan agreement because they wanted to be darned sure that even after this was paid off that there was a house built on the balance of those lots that they had financed to develop.

By the Court: Well, now, is there a provision in there that says that if the indebtedness is paid before or if the lots are utilized that the remaining lots would be utilized with U. S. Steel Homes?

Mr. Reutlinger: No sir.

Mr. Anderson: This language says, your Honor, that I have read you—

Mr. Reutlinger: (Interrupting) We are happy with that provision, Judge.

Mr. Hamilton: It says that upon proof that a house is constructed on said lot by U. S. Steel Homes. It just says they are not going to release it until we prove that we have bought and built the house on it.

Mr. Reutlinger: I don't see how you can get around where you paid your money and we gave you a deed of release on the lot and we have done that on three or four occasions in this transaction.

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Mr. Anderson: That's why I read the language in the loan agreement.

Mr. Reutlinger: We have even done it when you paid us for the notes; we have released them.

Mr. Anderson: That's why I read there the provision in the loan agreement that says that, uh, it will not be done—the lien will not be released, uh, the provisions of the agreement, the loan agreement will not be waived except by a written—uh, in writing by the Credit Corporation.

Mr. Reutlinger: We sent you a written release; that's what I'm saying.

Mr. Hamilton: I mean, as a practical matter, we—

Mr. Reutlinegr: (Interrupting) We said, "Pay us and you are home free." That's all we said.

Mr. Hamilton: No, you didn't; you just said—Mr. Dyas said, "You're going to build a home on every one of those lots."



Mr. Reutlinger: Or pay.

Mr. Hamilton: No, he didn't say, "Pay."

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By the Court: Well, what is it you are wanting me to do?

Mr. Anderson: Well, as I understood your Honor, you were either telling the jury as a matter of law or as a matter of construction of the document that, uh, we were released—Fortner Enterprises was released of the Tie-In Agreement if the loans were paid and we are submitting that that is not correct under the terms of the agreement or under the law and that that admonition to the jury should not have been given.

Mr. Reutlinger: Judge, I can add one more factor against their position. We all know that restrictions or convenants running with the land are used for various purposes and a mortgage is obviously an encumberance and mortgages, to be effective as an encumberance, are in recordable form.

The loan agreement under the State of Kentucky, which required the signatures to be acknowledged before a Notary Public, I think. Now, I'll have to go out and look at it again, but I'm willing to make a bet and we can look at it in very short while, but the loan agreement is not in a recordable form. So that it was not even our intent to have the loan

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agreement survive the mortgage. The mortgage is, as we know, a device, a security device for the payment of money.

Now, if Brother Fortner or his corporation had paid us all of the money he owed us we certainly had to release that mortgage.

We had to release that mortgage of record and there is no power on earth that could make us say it's still mort-

gaged to us when that mortgage is released of record and I have not gone into it recently, whatever reference it makes to the loan agreement, and I am sure that it does, but when the mortgage is released of record, the reference to the loan agreement, everything in the mortgage is lienless and we cannot record and did not record the loan agreements; that was not our intent and it never has been our intent.

Contemporaneously, we did not so construe the instrument. It is just not the law on this contract and let's assume that Mr. Dyas said what they say he said; that doesn't make it so under the law.

By the Court: Well, I think the law of Kentucky is to the effect that if the mortgage is released that's the end of it and nobody has to look beyond that, beyond that mortgage for any

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contract or other agreement referred to.

Mr. Anderson: If I might add this point—

By the Court: (Interrupting) And there is no provision here prohibiting it being paid off?

Mr. Reutlinger: No sir; on or before, the note clearly recites.

Mr. Anderson: Might I point out, your Honor, that even if that were the case, even if they did not, in fact, release the mortgage so we are talking about, uh, across the board, so we are talking about a moot point there, but even if they had released the mortgage this loan agreement is still a contract between the parties and whereas a bona-fide purchaser, for value, might be able to get a free and clear title to the land, uh, the Fortner Enterprises would still—was still bound by the terms of the loan agreement contract.

By the Court: But isn't it a fact that during the period



that this was in effect you did pay for certain lots and they were released from the effect of the loan agreement and the mortgage?

Mr. Anderson: I don't know

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to be positive, your Honor. They have talked about this for many years now, and they may have some evidence of it. I personally don't—can't say to the Court definitely one way or the other.

By the Court: Well, I am going to leave it where it is and just see what develops on that proof and if it develops on that proof that that did occur, I'm going to overrule his motion.

If it develops on the proof that it did not occur then I will so advise the jury at the time I instruct them.

Mr. Reutlinger: All right sir.

Mr. Anderson: Well, of course, your Honor, we would also take issue with this contemporaneous construction of his.

By the Court: I understand you do, but I would overrule your motion based on the law of Kentucky plus the happening of the actual fact, if it happened.

Mr. Hamilton: All right sir. Do you want to put in there that I read from the Corpus Juris Secundum—I forget what I was reading. I read 59 CJS, Mortgages, Section 454.

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By the Court: All right, gentlemen.

(Whereupon about the hour of 1:24 P.M. an adjournment was taken to open court and the following proceedings occurred:)

Cross-examination Continued

By Mr. Reutlinger:

Q. Mr. Fortner, as usual, I overlooked something this

morning which I would like to touch upon before we move ahead and refer you back again to Iroquois Developers about the time of this transaction between it and your Fortner Enterprises Corporation and the Steel people and ask you if you know, and if not, I'll refresh your recollection, what salary you took out of Iroquois Developers about that time?

Mr. Anderson: Your Honor, objection; irrelevant and immaterial.

Mr. Reutlinger: Your Honor, I would like to be heard on that. He is either a fifty per cent or a hundred per cent owner of Iroquois Developers.

This balance sheet shows a salary of $20,000 which is money in his pocket which he can use with this

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other project getting to an area of—possibly an area of fact because he has money to put back in if he chooses to pay it. He has either got $20,000 or whatever. He may not; don't know what the answer is, but he's an officer and let's find out who the officer is and what he got.

Mr. Anderson: But, your Honor, as I understand it, Mr. Reutlinger's argument—he's trying to say that they can owe him and get him with one hand and then complain, uh, about money not going into Fortner Enterprises from other organizations in which Mr. Fortner is involved or from Mr. Fortner himself.

Mr. Reutlinger: That is correct.

Mr. Anderson: The law does not require this. There is not any—this cannot pertain to mitigation of damages. Only the Plaintiff itself which is Fortner Enterprises, can be even remotely argued about—about mitigation; not Mr. Fortner individually and not any other corporations with which he is associated.

By the Court: Yes, but I still—I don't think this is competent, Mr. Reut-



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linger. I'll sustain the objection.

Mr. Reutlinger: All right sir.

Q. Now, Mr. Fortner, let's do something about the land profit figure of $400 and the reason I would like to do something about that starts with some interrogatories which were sent over through your lawyer, oh, I think sometime in the early part of this year and, uh, when you were asked as President of the corporation, certain questions about how you arrived at the claimed profit in your complaint, and I'm reading now your answer to Interrogatory No. 3, and before I do I will ask you if you recall discussing this with Mr. Anderson? This is the one that is signed April 3, 1970?

A. We discussed it; I don't remember.

Q. Well, yes. I'm not trying to test your memory by asking—

A. (Interrupting) Yes.

Q (Continuing) To recite it, and, you of course signed this document; you remember that, don't you?

A. Yes.

Q. That is your signature?

A. Un-huh.

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Q. Now, Mr. Fortner, the information, of course, that Mr. Anderson put in here had to come from your sources, didn't it?

A. That's right.

Q. I assume, however, that Mr. Anderson prepared this for your signature?

A. Yes sir.

Q. It wasn't done in your office?

A. Yes sir.

Q. I will read you now the answer to Interrogatory No. 3:

"The houses were priced to obtain a minimum of $900 profit per house; house including the profit in the land. The original cost estimate prepared by Homes Division, using the B-1 slab as a basis, a lot cost of $2,000 was used, plus a ten per cent profit of $667.68. There was additional profit in the lot of $200 to $250."

Now, let's pause a minute at that point. If I add two hundred to $667.68 I come up with something like $867 profit and you add another $50 and I get

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slightly over $900 profit, don't you?

A. Yes sir.

Q. Then your interrogatory, your answer further says that this resulted in the sales price on the Homes Division chart of $10,374.44.

Now, at this time you are using Homes Division's figures when you prepare your answer down to this point, but you are adding in here an additional profit of $200 to $250 for the land, aren't you? I mean that's what you just said, wasn't it?

A. I assume that, yes.

Q. Why was the figure, or why wasn't the figure of $400 for land profit used rather than the $200 that we find in this document?

A. We went over all these figures with our auditor and I can't explain it at the moment as to what was what.

Q. All right; and then your answer further says:

"Subsequent analysis by the Plaintiff—"

And that is Fortner Enterprises isn't it?

A. Yes.

Q. (Continuing) "—showed a total

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cost for the B-1 slab including the $2,000 lot cost, to be $10,690.90."



Now, when you say that, Mr. Fortner, and I assume you are referring to the analysis of the B-1 slab which you testified yesterday that your auditor and Mr. Miles worked out; is that correct?

A. Mr. Miles and the auditor and myself.

Q. Well, uh, yes, and perhaps there were others that helped you with that?

A. They did.

Q. And this you introduced as your Exhibit No. 27, I believe?

A. (Witness nodded head affirmatively.)

Q. Now, at this point, and if you can readily find your Exhibit No. 27 there, let's see if I can read from—where is it?

Mr. Anderson: It should be in the middle stack, Mr. Reutlinger.

Q. Yes. I find both in the answer to the interrogatories and in the B-1 slab column in your Exhibit figure of $10,690.90; is that correct?

A. Yes sir.

Q. And very properly, you have rounded that out to about $10,700, haven't you?

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A. I don't know; it's $10,900. That's close to seven.

Q. Well, let's certainly give you the benefit of the doubt and say you had another $9.10 worth of expense and that will bring it up to $10,700, won't it?

A. That's right.

Q. Now, you are still, and I will add one more phrase out of the interrogatory;

"The B-1 slab houses were priced at $11,400."

So, if you start out with $11,400 price and you have a cost of $10,700 you have only a $700 profit, don't you, and the arithmetic is right, isn't it?

A. Yes.

Q. So then, you say the B-1 slab houses were priced at a $710 profit on the house plus the profit in the lot of at least $200, or a total of least $910 profit on the B-1 slab.

So that, uh, well, see, I have rounded it off. So, between $900 and $910 is achieved by adding in $200 land profit and gives you your $900 profit and I am going to underscore "Land" because that's what we are talking about.

Now, it never was made quite clear to me yes-

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terday how you arrived at the $400 land profit figure. Could you explain that to me again?

A. I don't know as I explained it yesterday.

Q. Well then, we are even because I—if you did, I didn't catch it, so let's start.

A. I think you will have to go to the auditors' books. He will get to this, to exactly how we broke it down. He was our auditor and did the computing.

Q. Well, let's look at it this way, Mr. Fortner; you were—you recall your deposition when we started talking about these profits and lot figures, don't you?

A. Beg your pardon?

Q. You recall your deposition where we started talking about the profit and the lot figures?

A. Yes.

Q. And I'm sure that you recollect that at that time you were uncertain and that you agreed that Mr. Anderson would furnish me the breakdown and send it over to me.

Mr. Anderson: We will stipulate that, your Honor; we agreed to do that, but that—

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that we sent him a schedule and if that is the schedule you have got before you, why, no problem about that.

Mr. Reutlinger: Yes, that's it; all right.

Q. Now, on this schedule you have different values for



different lots and also value relating to improvements which of course are part of your land values. That is part of your land costs, isn't it, to improve it generally?

A. To improve the lot?

Q. Yes.

A. Yes.

Q. All right; I'll show you this schedule and it's a little difficult to read, but generally speaking, you have here for example on a series of lots in Section 1(b) a total cost of $1,755; is that correct?

A. Yeah.

Q. And then where you made some, I have improvements in Section 1(f) your basic land cost was only $75 but when you added the cost of improvements in your basis, the basic lot charge or basic land cost went up to $1,799.40?

A. Forty-five.

Q. No, went up another ten, isn't that—

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A. (Interrupting) Fifty-five—it's around fifty-something dollars.

Q. If you give me another forty cents I can round that number off to eighteen; it's easy, isn't it?

A. All right.

Q. So, we have here different kinds of lots because some are improved and some are unimproved?

A. They cost more at different—

Q. (Interrupting) I appreciate that.

A. If you get'em improved today it might cost you twice that.

Q. I understand that, but that was—we are talking about a different time.

A. Well, that was still a different—

Q. (Interrupting) I understand, but you had some lots at a cost of $1,755 and because you gave the sixty-some odd cents you had some lots with a cost of eighteen?

A. I don't know how the auditor broke them down, but—whether he broke it down by square foot or not—if he did, why, lots of sections of the lots, uh—

Q. (Interrupting) I understand, but these

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are all averaged and then you add thirty-two more lots which you put on the second transaction; is that correct?

A. Right.

Q. Now, when you borrowed the money you borrowed—and, this was a hundred per cent, all of the money you needed to buy and develop the undeveloped lots where they were undeveloped; isn't that correct?

A. Yes sir.

Q. And did you borrow any more money than you needed for that purpose?

A. Not to my knowledge.

Q. All right; and when you borrowed in 1961 for the second transaction with regard to the thirty-two lots which I understand you developed, you borrowed only enough money to buy those lots, didn't you? You didn't borrow any more money than you needed for land acquisition, did you?

A. I don't recall of borrowing more.

Q. You wouldn't want to borrow more than you needed for this purpose, would you?

A. I don't know. We might have needed some for some other—if we were in a hole at that time, getting in trouble with trying to get 'em finished or getting 'em started, but I don't know; that's

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what I'm trying to say.

Q. Didn't you represent that you were borrowing to buy land with, with that?

A. Yes, that was mainly so.

Q. Well, the first one you weren't in trouble because



you hadn't started. So, let's say the first one you borowed only enough money to buy and develop the land, one hundred eighty-seven lots; that's a fair statement, isn't it?

A. I don't remember how it was broke down. We borrowed what we asked for and that's what they gave us. If it's broke down I'd have to go into it.

Q. I want to go into it right now, Mr. Fortner; that's what I'm hoping to do.

A. Then I better get my auditor here to show all the facts and figures.

Q. He will be here?

A. That's what I—I wish you would ask him.

Q. Well, he can't get it over; this is your lawsuit.

A. That's why I've got him coming in.

Q. All right. Well, let's find out just why we are here, what the total of the first land note

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was, and if you will, look on this loan agreement which was that blue-backed thing that we used this morning and you will find that you have two land notes, don't you?

A. Un-huh.

Q. A and B?

A. Un-huh.

Q. And I think, and Mr. Anderson I'm sure will correct me, if you add up the total of those two land notes you have $319,920.00 and we already know that's about one hundred eighty-seven lots. Now, just so there can be no mistake about the second transaction I'll ask you to look at this document which is the loan agreement of August, 1961 and first ask you if this isn't the original and bears you signature, initials and so forth on it?

A. Yes sir.

Mr. Reutlinger: Now, I would like that to be introduced as Defendant's Exhibit 8.

By the Court: Let it be filed.

(Whereupon Defendant's Exhibit No. 8 was received in evidence.)

Q. That shows the land—shows the ac-

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quisition of land, I believe, of $88,000; it's in the first paragraph down there, isn't it? Is that right?

A. I haven't seen it yet.

Q. Well, we will look at it a minute if you don't find it. Look under Section 1(A) and it—well, I take it all back; that's exactly wrong; it's $59,000.

A. That's right.

Q. I wasn't trying to double-shuffle you; that would put it up too high, wouldn't it?

A. A little bit.

Q. All right; let's correct me on that. Now, this $59,000 figure on which I stand corrected is the—

A. (Interrupting) That's not as much as $2,000 a lot.

Q. I know that; neither is this one. We are coming to that one in a minute. That $59,000—well, let's do this first and again, someone is going to have to check my arithmetic. I did this last night, but if I divide one hundred eighty-seven into the first land note total, in round numbers, but I'm only rounding off in dollars and not in tens or twenties, I think you come up with—

A. (Interrupting) It wasn't all devel-

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oped, Mr. Reutlinger.

Q. I know that.

A. I don't see how you will get an answer that way; thirty of 'em was developed and the rest of 'em wasn't.

Q. Well, but you borrowed money both to buy and develop?

A. And develop; that's all true; okay.



Q. And the money you borrowed to buy and develop is this?

A. All right.

Q. You buy and develop.

A. All right.

Q. And you end up with a figure per lot for those of $1,710, which is within, and remember, I am rounding off now, which is within ten dollars of the schedule.

A. No question.

Q. On your loan agreement; it matches that. I am speaking now of the loan agreement which is Exhibit No. 7.

A. (Witness nodded head affirmatively.)

Q. Let's see now; this one matches the newest loan agreement, the one in Exhibit B; of our

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Exhibit No. 8, gives a lot value of $1,845, doesn't it?

A. What does that mean?

Q. Here you are, right here (Indicating); this column in this Exhibit B?

A. I know, but does that—are we doing this or what?

Q. Yes sir; I'm just asking you if it is there; does it say eighteen?

A. Yes.

Q. Fine. Now, if I divide thirty-two into $259,000 I come up with a figure of $1,843. So, we are only two dollars apart. Somebody has rounded off some figures, haven't they?

Mr. Hamilton: What is your division there?

Mr. Reutlinger: I have divided the thirty-two into $259,000.

Mr. Hamilton: What about up above there?

Mr. Reutlinger: I have divided one hundred eighty-seven which is the total number of lots in the first transaction by the total amount of the—

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Mr. Hamilton: (Interrupting) You divided one hundred eight-seven into three hundred nineteen?

Mr. Reutlinger: That's the two notes. You have two land notes in the first transaction.

Mr. Hamilton: Did you divide one hundred eighty-seven into three hundred nineteen?

Mr. Reutlinger: Yes sir, and I divided in the second transaction thirty-two lots into $59,000.

Q. And the figures they come up with on division match within a few dollars, two dollars or five dollars of what you find in your loan agreement, don't they, Mr. Fortner?

A. Yes sir.

Q. All right. Now, if I average these two figures, by totaling that amount of money and dividing it by your two hundred and nineteen lots, which is what you have involved here we get into an average cost of $1,738, and I'm sure Mr. Hamilton will check me on that.

Mr. Anderson: Mr. Reut-

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linger, may we approach the bench, please?

(Whereupon counsel approached the bench at this point.)

Mr. Anderson: Your Honor, I can't—I have a vague idea of what Mr. Reutlinger is driving at here, but there is no evidence that all of the money in these notes that Mr. Reutlinger is talking about was advanced. As a matter of fact, one of the documents that I have designated as an Exhibit shows that some of the funds were not forthcoming.

By the Court: I think you can bring that out on cross.

Mr. Reutlinger: I am sure that all of the land was advanced immediately; that was the purpose. He is thinking of construction notes.



Mr. Anderson: No.

(Whereupon counsel returned to counsel table.)

Q. If my arithmetic is correct, and Mr. Hamilton is working on it—

Mr. Hamilton: (Interrupting) You are all right.

Q. (Continuing) We have here involved two hundred nineteen lots which you purchased with various

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amounts of borrowed money for an average of $1,730 per lot. I say, assuming the arithmetic is correct, which Mr. Hamilton tells us it is, that—

A. (Interrupting) That's true.

Q. That's true; all right. Now, in your projection, and this is on what you based your profit, you gave a lot cost of $2,000 and then you tell us that there is a profit in that lot cost between—

A. (Interrupting) We put a value on 'em of $2,000.

Q. Well, let's look at it this way, Mr. Fortner; if you value the lots at exactly this, you would have some of them for no profit and your profit would be in your other figures, so you valued them for your purposes at $2,000, didn't you?

A. Yes, sir.

Q. Now, if—it's very simple to subtract from your $2,000 valuation the $1,730 which comes up some like $270.

Now, based on your projection, using this value which is you—I'll put "F. E.", for Fortner Enterprises, land value, Exhibit 2, twenty-seven, and if my arithmetic is right, the difference, or the profit between $1,730 and the $2,000 is $270, isn't it?

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A. According to that.

Q. Well, my arithmetic is right; you'll go that far with me?

A. Yes, yes.

Q. All right; so that instead of $400 profit on each lot you had $270 according to those figures, all of which come from documents which you signed or prepared.

A. Mr. Reutlinger?

Q. Yes sir.

A. We didn't develop the land until we borrowed the money.

Q. I understand that.

A. And we borrowed the money and it's quite possible we will know more when we get in our auditor, but it's possible it probably didn't cost that much to develop. We may have got some cheaper so we may have saved some money. I am assuming there is a reason for it.

Q. All right. This can be developed.

A. I'm sure it will be because we show this kind of profit.

Q. Well, let me ask you this—

A. (Interrupting) I am taking my auditor's

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word for it.

Q. I understand that, but if you show that kind of profit—

A. (Interrupting) Well, he's going to explain it. I've told you that several times.

Q. Well, I know, but you see my problem is, Mr. Fortner—

A. (Interrupting) You can't make an auditor out of me.

Q. I don't want to do that, nor can you make one out of me. We have the same problems. My problem, however is in this case, that I have to rely on material furn-



ished me over your signature, prepared by your lawyer after, I assume, making some effort to ascertain what the facts are.

A. I understand that.

Q. And at no time has anyone up until now told me about a $400 profit. You have used $200 and $250; that's correct, is it?

A. Different ways, yes.

Q. You haven't used anything that says three hundred or four hundred, have you, when you talk about land profit up until yesterday; is that correct?

A. I am willing for you to take the audit-

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or's word just like if I had said it. So, he can straighten out the—

Q. (Interrupting) I understand, but I can only go on what the President of Fortner Enterprises tells me. Isn't that—

A. (Interrupting) You're not going to go on anything he says?

Q. I would rather go on the President of Fortner Enterprises; you have more at stake.

A. That's what we've an auditor for, to keep it straight. I can't just—

By the Court: (Interrupting) Well, just let's get on with this, gentlemen.

Mr. Reutlinger: All right.

Q. Now, who prepared, besides you, and in addition to Mr. Cooper, the auditor, and Mr. Miles, this B-1 slab computation which you tell us is the standard; that's your Exhibit 27.

A. Who else?

Q. Yes, anyone other than those people?

A. I think Mr. Smith gave 'em a little help.

Q. Yes, that would be Earl Smith?

A. Un-huh.

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Q. He is your Sales Manager?

A. Yes, he got a lot of figures together. He had nothing to do with the final—

Q. Yes. In that you have figures of $7,790.90 for various costs, and Mr. Anderson went over them yesterday and I want to check you on a few of them.

Now, I believe as you went down the list you said the F.H.A. appraisal was a closing cost?

A. It was part of the fees in connection with getting the loan and closing.

Q. Yes. Now, the engineering is part of your basic construction costs; that was plotting the building?

A. That's right.

Q. So, let's put a "Cl" by closing costs. Now, the water meter is part of your basic costs and the concrete work is part of your basic costs?

A. (Witness nodded head affirmatively.)

Q. And the ground treatment for termites is part of your basic costs and the package house and electrical work and the heating and plumbing and the carpenter and the dry wall and the lumber, floor covering and the tile and the gutters and the finished grade and the masonry and that's the brick work, isn't it?

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Q. That's a part or your basic costs?

A. Yes.

Q. And sod in part of your basic cost and driveway. Now, these were gravel driveways, weren't they?

A. Yes sir; gravel, yes.

Q. And you have your overhead, liability insurance



and this went to Crestwood Homes, didn't it, along with the Supervisory?

A. I don't know.

Q. Well, you don't know. Let's put a "O" for overhead, with a question mark and maybe we can find out from Mr. Miles.

A. That's right.

Q. The supervision fee is part of your basic costs, isn't it?

A. Yes sir.

Q. And stamps, deed and release and whatnot, they are part of your closing costs?

A. That's right.

Q. And then the accounting fees are part of your basic costs, per unit?

A. Right.

Q. All right. Now, what did the heating

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work incompass; what did they do for that?

A. Put in the furnace and duct work that was necessary.

Q. Let's see; you have no painting as such. Did the carpenter have that?

A. We had painting.

Q. I know you had painting, but—

A. (Interrupting) Right there.

Q. Where you have—this is all one?

A. Yes, they worked together.

Q. I see. That's what I'm driving at. And your concrete work for your sidewalks and your porches and your basements and your slabs, things of that kind?

A. Beg your pardon?

Q. Things of that nature, pouring your concrete.

A. What do you mean "Things of that nature"?

Q. Well, you had here driveway, but that wasn't concrete, was it?

A. No sir; I don't believe it was.

Q. Poured concrete is what you call concrete?

A. That's the basic.

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Q. The basic charge, yes.

A. Yes.

Q. And that would be if it were a slab house, the slab, and if you had a crawl, the little raise for the crawl space, or the basement.

A. That's right.

Q. And the porch, if you had it?

A. And the steps and sidewalks.

Q. Steps and sidewalks?

A. Right, that was sidewalks in the yards.

Q. Across the yard.

A. In the yard; not outside of the yard, not in front.

Q. Where did they come in?

A. Do what?

Q. Where is your accounting for the sidewalks across the front?

A. Most of it will be in the developing costs for the lot that you had a while ago, working on it.

Q. I see. All right; would all of it be in there?

A. I don't recall.

Q. I see; all right. Now, on the overhead

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costs you have listed here—I'm speaking now of the difference between the closing costs and overhead; you have, as far as we've gotten now, possibly forty dollars, haven't we?

A. Yes.

Q. Now, are any of these items—do you include in



overhead costs or are they closing costs? I'm speaking now of these items which are real estate.

A. The first one is the lot. What is the next one?

Q. The lot, real estate commission, discount and interest.

A. They are not.

Q. They are not overhead costs as such?

A. No, not basic costs—other costs.

Q. No, I know they are not basic costs nor overhead.

A. Right.

Q. So that when you end up with the cost of $10,690, or rounded out to $10,700, we as yet have no overhead costs in there, do we, except for the perhaps fourth?

A. That's right.

Q. Where do we find in your Exhibit No. 27

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with reference to the B-1 slab any of the overhead costs?

A. We would have had very little overhead if the project had went like it was supposed to and that's why we didn't allow for too much of it—arranged by Mr. Miles and he had such an arrangement to where that he handled most anything that went wrong.

Q. Well now, you are speaking now of correcting mistakes and I am speaking—

A. (Interrupting) Not necessarily.

Q. I see.

A. Some of his, if it was broken down, probably he considers some of the overhead.

Q. Well, did you allow, for example, any advertising?

A. Yes.

Q. Well, how much did you allow?

A. Zettwoch-Fortner allowed for advertising.

Q. Did you charge any advertising to this project?

A. I don't recall. I thought Zettwoch-Fortner paid the most of it.

Q. Well, you don't know whether or not—you are Fortner Enterprises—paid for any advertis-

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ing then?

A. Not without checking the records.

Q. All right; did you provide for furnishing the models which I guess is part of advertising?

A. We had money for that, yes. We didn't divide it out over the house, no.

Q. Well, what you're saying then is that there was money to be set aside for a model home by way of advertising?

A. We had a cash flow going all the time and we'd sell the house. We had money and some of our buildings and things didn't get paid right away and we had money to do with and things.

Q. I'm not speaking of the variable of money, your cash flow; I'm speaking of your allocation of the overhead.

A. We didn't provide—didn't program and provide or furnish the lots over all two hundred fifty houses, no.

Q. Did you program or allocate out of your one hundred nineteen lots on this Plaintiff's Exhibit 1 anything for decorating services, dues or subscriptions?

A. Well, decorating services are included in

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the furniture there that you're talking about.

Q. Well, perhaps they are.

A. Dues and subscriptions, no.

Q. I am not doing right by you because I am reading off of your audit and you don't have the benefit of it.

A. I don't know about these restrictions.

Q. Do you recall ever seeing this letter which is addressed to Fortner Enterprises, dated June 20, 1966?





A. I am sure I've seen it.

Q. And this bears Mr. Cooper's signature?

A. Yes; his signature.

Q. At least that copy does, and it shows an estimated gross profit in two hundred nineteen houses at $903.50, doesn't it?

A. Yes sir.

Q. And of course he adds back the utility deposits which were refunded, which is proper, isn't it, and then Mr. Cooper, preparing this for you, projects and allocates various overhead costs which are the deductions against this nine hundred per unit profit, doesn't he?

A. You are getting into that accounting

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here and I don't know how you get it.

Q. Well, if you start out with a suggested profit of $197,000—

A. (Interrupting) See, this is an estimate.

Q. I understand.

A. Lots of these houses we had twelve hundred and thirteen hundred setup and it took care of anything coming along, but we never got to build them.

Q. I understand, however, your accountant shows in June or July of 1966 that the estimated gross profit is two hundred houses at $903.50 each, or $197,866.50, doesn't it?

A. That's what he did.

Q. All right. Now, when you brought your suit, by amendment to your complaint, you asked that among other things that you be allowed to recover for lost profits and if we cut it down by three dollars a house to nine hundred for each of the two hundred nineteen houses, or a total of $197,100, that's what you asked for in this complaint and that's what you're asking for in this suit?

A. Among other things, right. We should have asked for lots more because we had more profit

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built into those and we made it fair by rounding it off to nine hundred.

Q. Well, I appreciate your not asking me for more, but in any event, the accounting procedures claimed you would make $197,866.50, doesn't it?

A. That's right.

Q. Now, your auditor told you that he estimated that in addition to the other expenses which he had used to achieve this $197,000 figure, which is a close figure, you had many, many times more dollars coming in and your costs abutted off against that, aren't they; this is your gross profit, isn't it?

A. Estimated.

Q. You estimated that; I understand that.

A. Yes sir.

Q. But he also indicates that you had other direct costs?

A. Yes sir.

Q. And when he estimated that you had other direct costs, he comes up with an estimated net income for the entire project of $127,577, doesn't he?

A. Well, that's what it says there.

Q. I mean, that's what he said.

A. Yeah.

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Q. Now, so that in 1966 you knew because of an audit or a projected audit, that you didn't make or couldn't expect to make $197,000 dollars rounded off, but instead you would be making more like $127,000. That's what your auditor—

(Interrupting) That's what he says there.

Q. All right. I would like to offer as Defendant's Exhibit No. 10, a copy of which the Reporter already has, a



copy of the projected statement of operations, Fortner Enterprises Incorporated, over the signature of Mr. Cooper, a C.P.A., dated June 20, 1966.

By the Court: Let it be filed.

Mr. Anderson: We have no objection.

(Whereupon Defendant's Exhibit No. 10 was received in evidence,)

Q. Now, Mr. Cooper is right. He has, by arithmetic again, lowered the profit from $900 a unit by projection, to somewhere in the neighborhood of $582 because he had deducted certain expenses but he says he thinks you will or should have, doesn't he, if my arithmetic is right; has he done that?

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A. I don't know what the difference—

Mr. Anderson: (Interrupting) We will agree your arithmetic is right.

Q. Well, if my arithmetic is right, which you should always suspect, he tells you that $197,000, which is the loss of profit you sued for—

A. (Interrupting) But I imagine the difference is the loss, probably; I don't know.

Q. Well, we covered that earlier.

A. We covered it your way.

Q. Now, I honestly don't concede that he is accurate in these projections and we will show that when he is on the stand.

A. Yes, I—

Q. But let's assume that he is; what you have done, Mr. Fortner and what he has done.

A. I think you'll find him accurate.

Q. Well, I—not on a projection; that's a guess. What he has told us here is that there is about a difference of three hundred, and we'll round that off, a difference, more

or less, and the difference he tells us is, as he phrases it, overhead expenses, like he tells you in the audit, doesn't he—would you like to look at it?

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A. Yes, I can see it.

Q. All right. Now, this could be something we could work with, which is the $40 per house on overhead and liability insurance, however he has projected a different kind of insurance, or at least insurance only in the amount of $3,200 in his overhead and initially, $40 per unit was used. I think you will find that the insurance bill would have been $8,746. You really don't have any duplication.

So, what you have here, in your original computation—no provision at all, if I'm right about the insurance; there's nothing at all for overhead is there?

A. Not there, no.

Q. All right; of course this was put on the board yesterday out of your Exhibit No. 27 and is Mr. Cooper's, your auditor, and he has told you that you could expect this and the aggregate amount of this, or $582 a unit so that you have $315 less according to Mr. Cooper; that's true, isn't it?

A. According to that sheet, yes.

Q. And the arithmetic and Mr. Cooper, but you don't stand for the accuracy of this?

A. But if it concerns figures, when Mr.

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Cooper comes in, he can talk about it.

Q. So, if this $40—again, if my arithmetic is right, that's a figure of $876, and he shows insurance only in the overhead there, for insurance, a figure of I think $3,200, and the reason I am putting that down, Mr. Fortner, is to show that this is definitely different because if you add $40 for insurance for each until it goes up to the larger figure, you see.



Now, we then look into the closing costs and let's see what they are. We have F.H.A. appraisal of $25 and then we have stamps and what not on the deed which is estimated $25.

Do you have any other closing costs as distinguished from the commissions, discount or interest on your projection?

A. Mr. Cooper has every bit of that, all of the closing costs and everything.

Q. I understand that, but so do I. I'm asking you on this projection, Mr. Fortner, do you have anything listed for closing costs except an F.H.A. appraisal and except for stamps on the deed and release and so forth?

A. Right.

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Q. So, there's nothing been allowed on this projection for closing costs?

A. That's right.

Q. Let's get another page and say, "Closing Costs," and incidentally, these come out of your pocket, don't they; the seller pays closing costs?

A. Sometimes.

Q. Well, before we reach contracts in almost every occasion here, the seller paid closing costs with one exception here; isn't that true?

A. I don't recall.

Q. Well, you don't recall. We will look at them all. Closing cost, $25; F.H.A., uh, $25; stamps, deed and miscellaneous, which is $50, and except for this $50, there is nothing in your projection for the closing costs; that's true?

A. (Witness nodded head affirmatively.)

Q. Now, let's look at some of the closing sheets which you have over there, and start bringing me those files and start with twenty, please. Mr. Fortner, it is unfortunate

you and I didn't discuss this. I indexed these closing sheets by dates of closing and you have them introduced by the date of contract, however last night I got into the thing and I quoted them

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so that I can—if you will, pick up those closing sheets and contracts, which you introduced yesterday and you start counting down by numbers and I can tell you which one, down the list, to look at and if you will, first look at—oh, it might be easier if we gave him a place to spread it out.

A. This is all right here.

Q. I think Mr. Fortner would be better served if he had somewhere to spread some of this out. See if you can find the closing sheet on Lot 20, which would be down about eighteen from the top. Let me show you what your lawyer showed me yesterday. Have you got the lot numbers?

A. Right there, one hundred ninety-six.

Q. No, that is Lot 696. I said Lot 20.

A. I know. That's the lot numbers and I was just showing you I was finding—

Q. (Interrupting) But you passed it though. It's way up here (Indicating).

A. I thought you said it was about eighteen down?

Q. Well, it is the eighteenth one you filed and it is Lot 20.

Mr. Anderson: I have a copy.

Q. Yes. Mr. Anderson is going to follow me

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Mr. Fortner. Now, on that closing sheet as a separate item you have stamps on the deed, release and preparing deed, and those are in the amount of very close to what you estimate, $26 and some-odd cents, but they are separate items as closing so that for this lot, and I don't know whether we are going to go through all of them—I rather



hope we don't—for this Lot 20 you have listed separately the stamps on the deed, the deed itself, and release fee at about $26.

So then, for the purpose of Lot 20 we "X" that out. Nowhere on this closing sheet will you find any F.H.A. appraisal, however, you will find closing costs paid to the Louisville Mortgage Service Company of $271?

A. Is that a B-1 slab?

Q. Yes sir. Well, no, this is a B-23 crawl.

A. What did the house sell for?

Q. The house sold for $13,350.

A. That includes the closing costs?

Q. Yes sir.

A. All right; see, that's a different—

Q. Well, but you haven't got closing costs on the—if you would look at—

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A. (Interrupting) You have got much bigger profit built in some of those other houses.

Q. I see; but you don't have any closing costs on your B-23 crawl, as I recall it, do you?

A. No, but I say, we have—some of 'em we have a much bigger profit built in.

Q. Let's talk about this transaction for a moment.

A. We're trying to see how that $900 built up too.

Q. Let's find out about this transaction and then we can go into others and I—I have no objection to looking at your closing cost figures. Now, you have nothing in your—

A. (Interrupting) I don't know whether this is one of the first houses sold or one of the last.

Q. It is the first one sold, I believe.

A. Is it?

Q. But they get worse as they go along on these costs, but that's all right.

A. We had to do a lot of things to get rid of these homes.

Q. Yes sir. I think you told me that nothing

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happened with the first one; that you got rid of it. It went well for a while, didn't it?

A. Yes, as far as sales—went well.

Q. Sales went well; closings went well?

A. When we could get 'em finished.

Q. Well, of course where you did project closing costs in your Exhibit No. 27, it's not there is it?

A. No, don't seem to be.

Q. All right; so that if we put the $271 in closing costs and take away the $25 F.H.A. you have got about $245—round that out, and you've got $245 expenditure on this first house you sold and closed and one of the first you sold which you didn't expect; isn't that correct?

A. That we didn't expect?

Q. You did not expect because you have not put it anywhere.

A. I can't answer that until we see the real figures of the audit of the books. This is a projection sheet.

Q. Let's look at the closing.

A. I don't even know whether the firm bid is on the projection sheet or nothing about that.

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Q. I'm not talking about—I haven't got that far yet.

A. I know, but you said only seven hundred and you did, a while ago, subtract from the $900.

Q. I haven't done anything with this figure.

A. Not those, but before you keep taking it down.

Q. That was when we were talking about the difference between the lot costs.

A. I don't think it's fair until he gets here with the real figures.



Q. Well, let's see what you say and then we will talk to Mr. Cooper too. I am not trying to avoid talking to him. Suffice it to say if the closing sheet shows a closing charge or closing costs paid to the Louisville Mortgage Service of $270 and you have only allowed $25 on your exhibit then that is $245 or $246 expense you didn't anticipate.

A. On that statement.

Q. On this statement; that's all I'm asking.

A. Yes.

Q. That's true, isn't it?

A. Yeah.

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Q. Now, you also in your projection, again referring to this Lot 20, indicate that there will be a discount of $350. Now, this is an average discount, I know.

A. Yeah, but I don't know what is was, this was an estimate.

Q. I realize that; I'm about to tell you what it was.

A. All right.

Q. And this, of course, has to do with the money market at any given time, doesn't it?

A. Yes.

Q. The discount, as shown on this closing sheet, also paid to the Louisville Mortgage Service, was $518, which is a couple more hundred, almost two more than you planned, isn't it?

A. Uh, I—I can't explain it. I don't know what went wrong. The discount wasn't that much on our first house. We would have been stopped right then.

Q. Well, Mr. Fortner, let's—maybe you better look at it.

A. Could it be altogether?

Q. No sir; I don't believe so. Let's run

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down the list and see what we've got. The top lists the revenue stamps on the deed $14.85, right?

A. Un-huh.

Q. Less commission paid Zettwoch-Fortner, $300, right?

A. Right.

Q. You get balance for deed of $363.94, right?

A. Balance for deed?

Q. Right there (Indicating).

A. Yeah.

Q. Now, Louisville Mortgage Service took a discount fee on this transaction which was the first one closed of $518, didn't it?

A. Louisville Mortgage Service Company, four per cent discount.

Q. Yes sir.

A. Fortner Enterprises—

Q. (Interrupting) You can—I'm not going to skip this one.

A. That is what it says, $518.

Q. Then, you have borrowed on this B-23 crawl $11,870, or borrowed some and you paid it back with interest, of $11,870.31, didn't you?

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A. Yes sir.

Q. Then the Louisville Mortgage Service also in closing costs, charged $271 which would include a $25 F.H.A. appraisal; is that correct, or at least that it what it says on this closing sheet?

A. Right.

Q. And then of course, they took a release fee of a dollar and ninety cents and for preparing deed, $10, and this is the first transaction?



A. But that's not a B-1.

Q. Yes sir; I know.

A. What did that house sell for?

Q. Well, let's see. I can tell you again. I've got the contract here, $13,351, or—I just can't read that.

Mr. Anderson: Closing statements shows $13,350.

Q. I think somebody typed the other.

A. That's why some of the expense was heavier—sold for more than $11,400.

Q. Sir?

A. It sold for more than like the B-1 at $11,400.

Q. That's right. Well, maybe that would

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be appropriate here; let's see. Let's look at eighty-three. I'm trying to refer to Lot 83, Mr. Fortner, which is the—

A. (Interrupting) When was that closed?

Q. I'm going to tell you in about a half a minute.

Mr. Anderson: Let me have a chance to find it.

Mr. Reutlinger: Yes sir.

Mr. Anderson: How far down did you say it was?

Mr. Reutlinger: Well, it would be fifty in your numbers. It was closed—wait, I've got that on a card.

Mr. Anderson: Here it is.

Mr. Reutlinger: Closed in 1962 sometime.

Mr. Anderson: May 29th.

Q. May 29, 1962.

A. What sale price was that house?

Q. Now, this closing—the contract—the land contract is for B-1 slab and the reason I picked this, Mr. Fortner, is because it is a pure B-1 slab and $11,400, which is your standard of what we

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have using as a yardstick, isn't it?

A. Yes, it was in '42.

Q. No, 1962.

A. '62, when we were having—

Q. Now, you estimated for the B-1 slab, a discount—Lot 83 up there—a discount of $300 and closing sheet shows that the discount paid the Louisville Service Company was $553.10.

Now, that's a charge that the mortgage company made for the use of the money at that time, the discount?

A. Yes.

Q. That has nothing to do with anything except the money market at that time; is that right?

A. Right.

Q. And you have no control of it; I have no control of it; Mr. Horn has no control of it?

A. (Witness nodded head affirmatively.)

Q. It is simply the money market, but in any event, in this $11,400 transaction, the discount exceeded the projected discount by $253, which is out of your pocket because of the money market; isn't that right?

A. That house was along when we were stop-

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ping and the money market had gone up.

A. That has nothing to do—well, I understand that, but the condition of the house has nothing to do with the general money market, does it?

A. No.

Q. All right; so that this closing put you short right now because of the money market; not what you may have done to the house, not what we may have done to the house, but because of the money market you have got the shorts here of about $253?

A. (Witness nodded head affirmatively.)

Q. Now, also in this transaction, you have a closing cost paid to the Louisville Mortgage Service of $267 and we know that you have projected over here as closing costs only two items, F.H.A. fee and preparing a deed and release.



Now, I also find on this closing sheet the revenue stamps as a separate item not in closing costs, and I do—I find the $45 item which might be paid to Zettwoch-Fortner for the thing, but let's give you—except for half of it, let's give you the whole closing cost you have estimated of $50 although we do have the stamps separately, but that's too difficult.

Let's give you the benefit of that. You have

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$217 of the closing costs which you have not accounted for anywhere; is that correct?

A. On that sheet, no.

Q. Well, at least the arithmetic is right. Now, we also know that Mr. Cooper at least has told you when he projected that you should allow for overhead on each house of $315, or at least that's what Mr. Cooper says on that little projection.

So, if I add the difference caused by the money market in the closing costs which appear nowhere in any projection I have yet seen and the overhead which Mr. Cooper told us about in 1966 I find that you should expect to get $785 less than your projected $900 allowing for your lot profit, if the arithmetic is right; is that correct?

A. According to that.

Q. All right; so your profit in round numbers on this particular deal is about $115 and that's the one we have just talked about, the $11,400.

Now, I'm going to read, Mr. Fortner, from each of these lots and it's going to be difficult for me to read these excerpts in Mr. Anderson's order because, as I say, we are not keyed and I wish we were and I'm going to offer in evidence all these closing

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sheets and contracts and either Mr. Anderson or Mr. Hamilton will correct me or check me up and anytime you feel

that I am reading outlandish figures you stop me and we will see what the actual figures are in each one, and if your Honor please, in this way it will save us from going through each one of these lot by lot.

Mr. Anderson: Well, I—

Mr. Reutlinger: (Interrupting) Now, I'll be perfectly willing to do it.

Mr. Anderson: Well, you are reading from a sheet of paper; you're going to introduce your sheet of paper into evidence.

Mr. Reutlinger: I have no objection to—if you want to—

Mr. Anderson: (Interrupting) I would like to, as you go along, see what you're talking about at least.

Mr. Reutlinger: I'll go slowly. We have already discussed the Lot No. 20.

Mr. Anderson: Right.

Mr. Rutlinger: We have already discussed Lot No. 83. Look now at Lot No. 50 which is the first one in your sequence.

Mr. Anderson: All right.

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Q. This is a B-1 model and it doesn't specify if it is crawl, slab or basement. So, I can't answer that, Mr. Fortner; it's discount plan on B-1 model is—is also the same, however.

A. It was up all right, so, it spoke for itself, I guess.

Q. No, I don't mean a model house—B-1 plan; I'm sorry. I misunderstood about one type of house. I don't know whether it was a basement, crawl, or slab. The planned discount there was $300 and the actual discount of $354 and you had closing costs of $274.50.

A. What was the sale price?

Q. I can't answer that until I look at the contract, but



I would be glad—the sale price was, uh, $11,400. Why, that's the same one.

Mr. Hamilton: Lot 50?

Mr. Reutlinger: I've got the wrong one; I'm sorry. I was looking at eleven; I take it back. I am looking at the wrong one.

Q. The sale price was $11,800.

A. That makes a little difference.

Mr. Anderson: $12,175; that's right; that was the down payment.

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The Witness: Figure that one out.

Q. Sir?

A. Figure that one out; see how much it—

Q. Now, you do have to add in the G.E. kitchen range and the extras here.

A. I don't know.

Q. Well, they are on the contract.

A. Are they separate or—

Q. (Interrupting) Yes sir; they are listed separately.

A. Priced separate?

Q. No, all in the price. Do you want me to go through them one by one?

A. I couldn't tell you how they did it.

Q. Sir?

A. I couldn't tell you on that how they did it.

Q. All right. Well, in none—you are selling the basic package and then when you add these extras you add prices to them, don't you?

A. Yes sir.

Q. And this particular contract on Lot No. 50 has a G.E. kitchen with built-in Mark IV oven

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and range No. TB 364-V, refrigerator, and it looks like a combination washer-dryer, in brown. Then, telephone or

television, something, wiring and closing costs to be paid by seller. So, there is—

A. (Interrupting) This must have been a model that they brought with the stuff in it.

Q. They bought it in March of 1961?

A. No, it wouldn't be—

Q. (Interrupting) The date of the contract. Well, in any event, the contract on Lot No. 50, or the closing sheet shows the discount of $300; the discount taken of $354, and closing costs of $274.50, plus the extras.

Moving now to Lot No. 57, which would be No. 19 in your sequence, we find that that is B-111 Model, and again, it does not specify whether it is crawl, slab or basement and in this one, the discount plan was $350, however, the discount taken was $258, less than you planned, but you find you had closing costs of $290.50.

Looking now to Lot No. 19, which is your No. 12 in Mr. Anderson's sequence, we find that this is a B-1 crawl. The discount planned was $300. The discount taken was less than anticipated and this was

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$229, however the closing costs had gone up to $300.50, again paid to the Louisville Mortgage Service Company.

We look now to Lot No. 336, which would be No. 2 in Mr. Anderson's sequence, and find that this is a B-43 crawl type house. The discount there was planned $350; the discount taken was $352 and you only pay $99 in closing costs to the Louisville Mortgage Service.

Mr. Anderson: If I read this correctly, the discount was $252.

Mr. Reutlinger: Didn't I say $252?

Mr. Anderson: You said $352.

Mr. Reutlinger: I'm sorry. I meant to say $252, because it is almost $98 less—I've got it $252 here.



Mr. Hamilton: Can you give the sale price; do you have the sale price on each year?

Mr. Reutlinger: I can give you the sale price off the contract which you furnished me, of $13,300.

Q. Now, this too has some extras to be in-

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cluded in the house according to the sales contract.

A. What does that have in it?

Q. Sir?

A. What does that have in it?

Q. What did you say?

A. What extras does that have in it?

Q. It says, "Front yard to be sodded."

A. That's not an extra.

Q. I see; well, it had to be done. Rear yard graded and seeded, six shrubs, two trees; extras to be included in house. Two Rusco steel storm doors and television, something, living. Now, are those extras?

A. No.

Q. Well, it says, "Extras to be included in the house, two Rusco steel storm doors" and a television—something wiring.

A. Those were standard.

Q. Those were standard in each house?

A. There is a television antenna.

Mr. Hamilton: If I may interject something, I think it says "Telephone prewiring", which is something the telephone company—

Mr. Reutlinger: (Interrupting)

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I see. Judge, I have another suggestion for shortening this even further which would be to read totals into the record and invite Mr. Anderson to check me up on it.

I have no wish to burden the Court's time or this jury

with a detailed analysis of the difference between the discount planned and the discount taken or the total sum of closing costs disclosed on material furnished me by Mr. Anderson. Would this be satisfactory?

Mr. Anderson: If the Court please, we have not objected to the introduction into evidence of our exhibits which are the contracts and the closing statements.

I regard Mr. Reutlinger's procedure that he has been following for the last minutes as not being cross-examination of Mr. Fortner, but as him trying to put a part of his case in as a part of ours.

Mr. Reutlinger: All right; we will do it one by one.

Mr. Anderson: I don't—

Mr. Reutlinger: (Interrupting) All right; okay.

By the Court: Well, I'm

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going to let you go one by one until three o'clock and then tonight you are going to get these two things together and give him a copy of your sheet and tomorrow you read it and if there is anything wrong with it you call it to my attention then.

Mr. Reutlinger: All right.

By the Court: But we will go ahead as we are until three o'clock.

Q. Let's look at Lot No. 52 which would be No. 11 in your order, which is a B-1 slab and the closing price was $11,250 and on the closing sheet we find revenue stamps, $1,265.

Mr. Anderson: No, $12.65.

Mr. Reutlinger: You are absolutely right. I am groggy from figures, and decimal points. You have the release fee and the stamps separately. You have the Louisville Mortgage Service Company's discount of $327 which exceeds by only $27 your planned discount and also a closing cost



payable to the Louisville Mortgage Service Company of $260.52.

Q. Does this sound about right, Mr. Fortner, or if it is on the closing sheet you wouldn't dispute it?

A. No, only thing about all this, it doesn't—

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doesn't tell you a thing because the auditor has the cost per house, with each house cost and you are comparing all this with estimates.

Q. No sir; I am reading from what it sold for.

A. I know, but when you was talking about this awhile ago, you was making it up in the estimates. He has got the actual costs and it looks like to me it would save a lot of time when he has got the actual costs here to—

By the Court: (Interrupting) Now, let's don't argue about it. Now, Mr. Reutlinger will try the case from his side; you go ahead.

Mr. Reutlinger: I must confess I think Mr. Fortner was right; I am trying to save time too.

The Witness: I'm sorry; I'm sorry.

Q. That's all right; let's look at Lot No. 51 which would be the fifth one in your sequence of events, and it's a B-1 basement.

Curiously enough, there appears to be no closing costs on that house. There may have been, but it certainly doesn't appear and we also find that the

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discount planned of $300 was beat and you only had to pay $206 discount, so you made on that transaction, except, Mr. Fortner, this was a B-1 basement house and if you will refer to your No. 27 I will ask you what the figure was for lumber in a B-1 basement house and I suggest you will find it is $76.60?

A. That's right

Q. I now show you from this same file, Lot 51, a photostatic copy of the statement from Cook Lumber Company which you certainly can identify as belonging to Lot 51 because it says so.

A. Lot 51.

Q. Yeah, right there, and it is, I believe, a statement from the Cook Lumber Company for material for a B-1 basement; is that correct?

A. It's doesn't say lumber.

Q. What other material would you use?

A. I don't know what it would be; I'd have to check with him.

Q. I see. Well, just give me the total of that figure.

A. $546.39.

Q. Now, the Cook Lumber Company does well other items?

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A. Mr. Miles—I'm sure he will have records here with him.

Q. Oh, I understand that, but in any event, the figure given on that piece of paper does not match, but far exceeds the projection for lumber for the B-1 basement, doesn't it?

A. Yes, according to that.

Q. Well, I mean it's—it does.

A. Materials; I don't know what it's for.

Q. Well, I know; Mr. Miles will know.

A. He will know; yes sir.

Mr. Reutlinger: I will ask that this be offered in evidence as Defendant's Exhibit No. 110.

By the Court: Let it be filed.

(Whereupon an invoice of the Cook Lumber Company, dated May 22, 1961, in the amount of $546.39, was marked for identification as Defendant's Exhibit No. 110 and received in evidence.)





Q. Now, just by coincidence, I happen to have from Lot No. 51 a check and verification that each

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of these are from Lot 51, and I am sure you will find that each are on the Cook Lumber Company and we are not going to introduce them, but just read into the record the total and what they are for.

A. The hood and sand, $45.69. Two by four, 8, for $12. Two splash blocks, $4. Four of some kind of hangers, $9.58.

Q. Well, they are all—they are all kinds of other things besides lumber in other words?

A. Yes.

Q. Different miscellaneous items?

A. But that's the way he billed. He has a total bill in each one of those deals that covers all that generally.

Q. Well, I know that; yes sir. Apparently he billed separately in this particular transaction.

A. Apparently.

Q. Yes sir. All right; let's look to Lot No. 70 which would be the sixth in your calculations, and this is a B-1 slab and I believe you will find when your lawyer looks at the balance sheet—I mean closing statement that the discount planned was $229 and the closing cost was $261 and this house sold for $11,300, which is of course $100 under your projection,

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wasn't it?

A. Uh-huh; when was that closed?

Q. It was closed August 22, 1961, and the contract was dated March 22, 1961.

Mr. Anderson: As I read the contract it says closing costs is included in the loan.

Mr. Reutlinger: That's right; and if you look at the—

Mr. Hamilton: (Interrupting) Excuse me; the last one

too, Al; it says that the purchaser—it specifically said that the purchaser was to pay the closing costs.

Mr. Reutlinger: That's not the way—

Mr. Hamilton: (Interrupting) If you will refer back to your Lot No. 51 there.

Mr. Reutlinger: Let me have that. Where is the closing statement on that, who actually paid it?

Mr. Hamilton: Here is the contract.

Mr. Reutlinger: Let's find out where it went, Mr. Hamilton. I hope I am right.

Mr. Hamilton: I think you

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are going to be wrong.

Mr. Reutlinger: Well, I don't want to be if I can help it. Let's see; do you have the closing statement?

Mr. Hamilton: Right there (Indicating).

Mr. Reutlinger: I don't think—this is Lot 51. I believe I read it and it was no closing costs at all—check the record; ask the reporter.

Mr. Hamilton: I believe you said that. I was just clarifying that the contract, because you previously made the statement—

Mr. Reutlinger: (Interrupting) So, I said most of them, not all. Well, you didn't claim closing costs in this transaction, did you?

Mr. Hamilton: I'm not sure; I just wanted to clarify it.

Mr. Reutlinger: If you really want to clarify—

Mr. Hamilton: (Interrupting) I think there was some indication at the outset, at least, Mr. Reutlinger, that the seller was to pay. I don't want to be argumentative.

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Mr. Reutlinger: I said in most—in any event, I do not claim in this transaction that the seller paid it.

Mr. Hamilton: Okay.



By the Court: As to Lot 51?

Mr. Reutlinger: Yes sir; and it so shows on my copy which Counsel will have.

Q. Now, let's look at Lot No. 70, which shows a discount planned of $309; discount taken of $219, which is less than you planned and closing costs of $261, which was taken out of your pocket and I'm sure Mr. Anderson will correct me if I am wrong.

Mr. Anderson: The closing cost is included in the loan and the person making the loan is purchaser.

Q. All right; we will look at this closing sheet and find out.

By the Court: Well now, gentlemen, the fact that they are included in the loan wouldn't have any effect on whether they were being paid by—they'd have to be paid—

Mr. Reutlinger: (Interrupting) Out of the loan proceeds; they are paid out of the loan proceeds, but it goes to—

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Mr. Hamilton: (Interrupting) The borrower is—

The Witness: The borrower paid it back.

Q. All right; we will look at this closing sheet and maybe we can quit for the day.

A. Mr. Horn is going to be here and he will straighten that out easy.

Q. Yeah. Well, I hope he will. Now, here is the sale price which is on the contract of $11,300; is that right?

A. Yes sir.

Q. Now, here are the disbursements from this. Now, let's stop right here. If it didn't cost you anything to build this house you would get all of that of $11,300, wouldn't you?

A. Un-huh.

Q. And if it cost you $10,000 you would get $1,300, wouldn't you?

A. That's right.

Q. Well now, let's see where the $11,300 went. Part of it was taken away from you, namely $12.65 to pay the stamps on the deed; that correct?

A. Right.

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Q. Part of it, $300, was not really taken away from you, but it was paid over to you as the Zettwoch-Fortner Corporation for a commission, but in any event, it was taken away from Fortner Enterprises, wasn't it?

A. Yeah.

Q. $45 was taken away from you, which apparently was—no, it was paid direct to seller. You did get $45, and I assume that's for the appraisal you made?

A. I don't know; I wouldn't want to say.

Q. Well, all right; Fortner Enterprises; and you got a dollar—wait a minute.

A. Wait a minute?

Q. Yes. Fortner Enterprises got $3,000—

A. (Interrupting) That's right.

Q. $3,119.74 on that transaction, right, in money?

A. Right.

Q. And you got $1.90 taken away to release fee; that right?

A. Right.

Q. You had that short discount and you made about, oh, $90 on that because the discount was only

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$219; is that right?

A. Un-huh.

Q. And you apparently hadn't borrowed much money



because you only paid back $7,309 and some-odd cents to the U. S. Steel people; is that right?

A. That's right.

Q. And the Louisville Mortgage Service is out of your pocket—

A. (Interrupting) Well, I—

Q. (Interrupting) Now, wait just a minute and just let me ask and then we will quit. Now, the Louisville Mortgage Service Company, out of your pocket, out of your $11,300, took a closing cost of $261?

A. I don't know whether it came out of my pocket or not.

Q. Let's start over.

A. Because it's not totalled over, the total amount of that check.

Q. Would you like to total it, Mr. Fortner; it's supposed to have come out of your pocket on that closing sheet.

A. I won't say that.

Q. Where did it go; let me ask you this—

A. (Interrupting) It could be it went to

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the Louisville Mortgage, but I don't say it come out of my pocket.

Q. Well, it came out of your price; this is your disbursement for seller.

A. Now, that—that's not all added up and balanced.

Q. Well, we will let Mr. Cooper add it up and balance it?

A. That's right; that's a good idea.

Q. If Mr. Cooper—

A. (Interrupting) Whatever he tells you I'll go along with.

Q. Everything?

A. I have always found him right.

Q. And if Mr. Cooper tells me on this one, Lot No. 70, that the Louisville Mortgage Service people took a fee for closing costs of $261 out of your gross sales of $11,300, you will be happy with it?

A. Unless we had it built in above that.

Q. Well, you want to look at the contract?

A. No. Maybe this was one before we raised the price.

Q. Well, I say, do you want to look at the contract again?

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A. I think it would be much better when Mr. Cooper gets here if he tells you.

Q. Let's look at the contract once before he gets here so we know what we're talking about. I think you will find that the contract is for $11,300, or at least I hope you will. Do you have that contract handy?

Mr. Hamilton: Right here.

Q. The contract says the gross price is $11,300, doesn't it?

A. That's right.

Mr. Reutlinger: All right. Now, if your Honor please, at this time, having tendered all of this material on Monday, I would like to offer into evidence as our exhibits, forty to one-hundred thirty-three, both inclusive, certain material which has been identified by that number and which relates to each of these transactions by lot number.

By the Court: Was that tendered on Monday?

Mr. Anderson: Yes sir; they were tendered on Monday.

By the Court: Let it be filed.

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(Whereupon Defendant's Exhibits Nos. 40 to 133 inclusive, were received in evidence.)





Mr. Reutlinger: Shall I keep on with this, item by item?

By the Court: No, we will adjourn for the day. Ladies and gentlemen of the jury; remember the admonitions of the Court and be back in your seats at 9:30 in the morning; thank you.

(Whereupon at about the hour of 3:01 P.M., an adjournment was taken, to reconvene on Friday, June 5, 1970, at 9:30 A.M.)

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## TRANSCRIPT OF PROCEEDINGS

## VOLUME V

Before Honorable James F. Gordon, United States District Judge, for the Western District of Kentucky, at Louisville, Kentucky, on Friday, June 4, 1970.

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The Captioned Matter was reconvened, pursuant to adjournment, on Friday, June 5, 1970, at about the hour of 9:30 A.M. and the following proceedings occurred:

By the Court: Good morning, Ladies and Gentlemen; you waive the roll call of the jury, gentlemen?

Counsel for the parties responded in the affirmative.

By the Court: All right; you may call your witness.

Mr. Reutlinger: If the Court please, by agreement, the order is waived and Mr. Anderson and Mr. Hamilton have been courteous enough to extend Mr. Dobbins the privilege of testifying at this time since he has to leave town. The Defendants will call Mr. Innes W. Dobbins, Jr.

By the Court: All right; come around and be sworn.

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MR. INNES W. DOBBINS, JR., called as a witness, by the Defendant, having been first duly sworn, was examined and testified as follows, to-wit:

By the Court: Now, ladies

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and gentlemen of the jury; all we are doing here is that as a matter of convenience to the witnesses, the Plaintiff has agreed to withdraw from Cross-Examination Mr. Fortner and to allow the Defendant, the U. S. Steel Company to put on Mr. Dobbins so that Mr. Dobbins can go about other business affairs; that is just what we are doing here and that's all.



*Testimony of Mr. Innes W. Dobbins, Jr.*

Direct Examination

By Mr. Reutlinger:

Q. State your name.

A. Innes W. Dobbins, Jr.

Q. Where do you live, Mr. Dobbins?

A. 347 Mockingbird Valley Road.

Q. How old are you?

A. I am ashamed to admit it; I am sixty-two.

Q. I don't know; I think that's right nice sometimes. Mr. Dobbins, I believe you are a banker here in Louisville, Kentucky?

A. This is correct.

Q. Tell the jury briefly your experience and history in the Louisville banking business.

A. All right; my first connection in the banking business was with the Kentucky Trust Company.

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I started to work for them—they are affiliated with the First National Bank—on January 2, 1931.

I worked there in the Trust Department. Then I was transferred from the Trust Department when the going got awfully rough in the '30's, to the Mortgage Loan Department where we had to trouble-shoot delinquent loans, and there were plenty of them.

I reviewed all of the real estate that secured the delinquent loans and then we proceeded to try to work them out as best we could.

I worked for the Kentucky Title-Trust, or Kentucky Trust Company until May 1, of 1933, when I went with the Liberty National Bank and Trust Company and made the officer in charge of the Mortgage Loan Department.

During the period of time we had to, very unfortunately, repossess a great deal of real estate and to resell it. Then we were charged, as the time changed, with the develop-

ment of a Mortgage Loan port-folio and to lend money to develop loans and to do what we could in that particular area of the bank.

I continued in that capacity—I've forgotten some of the dates, but I continued in that capacity for approximately—well, let's see; about eigh-

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teen years.

Then, I was transferred out of the Mortgage Loan Department into the General Banking Department, but still with supervision of the Mortgage Loan Department and the real estate policies of the bank, in which position I continued although I was General Loan Officer until oh, I would say about 1963, '64, '65 when we employed a young man, John Van Bibber, who is now Vice-President and Senior Officer in charge of the Mortgage Loan Department.

I was made Executive Vice-President of the bank and then I was made President of the bank in 1967, February of 1967.

Q. This is the position you now hold?

A. My present position, yes.

Q. Mr. Dobbins, I believe that you have familiarity and general knowledge of the local, and by "Local", I mean the Louisville area money market and credit market during the period 1959 through 1962?

A. Yes, I have every reason to believe I am familiar with it.

Q. All right. Let me digress a moment. Is the United States Steel Corporation a depositor with your bank?

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A. No.

Q. Is the United States Steel Homes Credit Corporation a depositor with your bank?

A. No. I wish they were.



Q. So, is Fortner Enterprises a depositor with your bank?

A. Yes, they have an account with us.

Q. All right. At my request, did you make a specific examination to determine the general availability of funds to lend in the Louisville market, or excess funds available for lending in the Louisville market during the years 1959 through 1962?

A. Yes, I made an analysis of the funds available there, and in approaching this, why, we took the bank statement of all of the banks in town as of June 30th on each of those used to determine the—look at the total deposits that they had, the total amount of loans that they had, and then we took seventy per cent of their deposits as being indicative of a percentage of total deposits that banks could possibly lend and we deducted the loan total that was shown in each of the bank's statements from the seventy per cent of deposit totals to show the availability or excess funds that would be available for lending on the part of

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banks.

We then took the savings and loan associations; we took their total amount that they had in shares or savings and as they refer to them, and took their total loans and deducted it, the loans, from that total to show the excess available in the hands of savings and loan associations.

Then, after we had done that for those years that you referred to, we totalled the excess funds in the hands of banks and the excess funds as shown or indicated in the hands of savings and loan associations.

Q. Now, are these purely local institutions you are speaking of?

A. These are all local institutions.

Q. All right; and by "local" I'm speaking of Louisville, Kentucky?

A. Louisville and Jefferson County.

Q. Well, Jefferson County; I'll go that far.

A. Yes, same thing.

Q. Can you give the figure for those years, Mr. Dobbins, and you may refer to your records?

A. Yes, I have them here; you want total figures?

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Q. Yes, just the total figures.

A. All right. Now the, I have here the total figures of excess funds computed in the manner that I outlined to you.

In 1959, $178,178,000 and you might just drop the $178,000 and let's deal in round millions.

Q. All right.

A. 1960, $196,000,000; in 1961, $204,000,000; in 1962, $202,000,000.

Q. Now, in addition to the money you have just discussed in the local market were other funds available or, in your opinion, were other funds available for lending from institutions which do this, such as life insurance companies or similar lending instiutions?

A. There were, very positively, funds and substantial funds from these other sources that were constantly coming into the Louisville market. Now, I have not carefully analyzed the total volume of these funds from building—I mean, from the life insurance companies and there are pension plans and many other sources that were making loans, but just to give you an example; you heard the excess funds that I indicated.

Now, I have here in my hand records that were

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published—this record was published and circulated and



supplied by the Lawyers' Title of Kentucky, Incorporated and this is a subsidiary of the Lawyers' Title Company out of Richmond, Kentucky, where I believe they have their home office, but they for years have published this annually, or these statements monthly, showing the total volume of market, mortgages that are made monthly by all of the institutions lending money in Louisville and Jefferson County.

Now, these totals include, well, Equitable Life, Prudential, all of the life insurance companies that were making loans here and I have these totals on an annual basis for each of the years that you are talking about. Now, that is 1959—

Q. (Interrupting) Through 1962?

A. (Continuing) Through 1962. We have totalled these on a monthly basis and these figures are available on a monthly basis, but we have grouped them on an annual total.

Q. If you could—

A. (Interrupting) During 1959, the total loans—now, don't misunderstand this; this includes the loans made by savings and loan associations, by banks here in Louisville and by insurance companies

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and other institutions. The total loans made and recorded in Jefferson County during 1959 amounted to $161,768,000; in 1960, $133,000,000; in 1961, in round figures, $143,000,000 and in 1962, $177—well, call it $178,000,000 in 1962.

They represented total face value mortgages recorded in Louisville and Jefferson County for those years. Now, this report does not include the recording of mortgages where the company or the mortgage brokerage firm or insurance firm recorded only one mortgage.

So, if anything, this is an understatement rather than an overstatement.

Q. All right sir. Mr. Dobbins, based on your knowledge and experience of the local money market in—well, in late 1950's and early 1960's, was financing available, and I'll use the term of a hundred per cent financing, to a land developer from any source for the acquisition and subdivision or development of land?

A. Uh, I didn't research this carefully.

Q. Yes sir.

A. But I do recall very definitely that on one occasion in the late 50's, Clyde Parrantine, who was the officer or principal representative of Pruden-

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tial, approached me and told me that they were in a position to make one hundred per cent—

Mr. Anderson: If the Court please, that is pure hearsay and we have to object to that.

By the Court: Yes, I'll sustain the objection as to what someone told him.

Q. Just your general knowledge of the conditions at that time.

A. Yes. Well, he advised me that they were in a position and did make a hundred per cent loans.

Mr. Anderson: Move to strike, your Honor; he said he was advised.

By the Court: Yes, I'll have to sustain that.

The Witness: Shall I go ahead?

Q. I think go ahead and give your testimony based on your general knowledge of the situation at that time.

A. Yes. Well, I was referring to Prudential as being the first occasion that I heard of this.

Q. Yes.

A. And they were making these loans for one





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hundred per cent financing of subdivision properties.

Now, they had an incentive in making this type of loan or otherwise they would not have made it. They—it was their desire and they used it as—

Mr. Anderson: May it please the Court; I must object to Mr. Dobbins' testifying about Prudential's intent and so forth. Mr. Reutlingers's question was his general knowledge and he's trying to tell us about a company which he doesn't represent.

Mr. Reutlinger: He might know about it though.

Mr. Anderson: The basis for his information that he has given us thus far is hearsay.

By the Court: Well, I think he can testify what his general knowledge is about what Prudential did; not just what some man of Prudential told him, but what he knows from his own knowledge that Prudential did; overruled.

Q. Yes.

A. I can broaden this base, if you wish. We have a number of mortgage companies like the Louisville Service Company that do business with us. We know that the hundred per cent financing was made avail-

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able—available by such institutions; that they did this in order to generate permanent loans for—for the client's portfolio.

They normally followed the policy of, when they went into a hundred per cent financing on a subdivision, the developer would see that either he, if he were going to build the houses, or the developers who were building the houses would get commitments from F.H.A. or from the V.A. for the financing of the complete house when completed according to the conditions and terms and requirements of either of these organizations and, uh, then how, for example, a

mortgage broker would take the commitment of F.H.A. in the mortgage broker's name.

This gave the mortgage broker a pretty lock on being able to control where that financing went because the mortgage broker did not have to assign that F.H.A. mortgage loan commitment to any other lending company unless they so chose to do.

So, if they held the commitment to insure an F.H.A. mortgage loan, they had a good lock on that financing if the purchaser went the F.H.A. route, you see.

Q. I see.

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A. Now, this gave them good assurance that they would be able to control the financing and that's the incentive and why they made hundred per cent financing to develop the subdivision.

Q. All right. Now, Mr. Dobbins, at my request, did you examine a financial statement of the United States Steel Homes Credit Corporation which has been identified for purposes of this litigation as a portion of Plaintiff's Exhibit No. 2, and there are several sheets to that which include a balance sheet and profit and loss statement or earnings statement for the years 1961 and 1962, but in which the one for 1962 also shows by way of comparison the 1960?

A. 1960?

Q. The 1960 figures.

A. Yes, I examined those.

Q. And, at my request, did I ask you to examine them with a view toward giving an opinion as to the earnings of that Credit Corporation and can you give me an opinion whether those earnings are below normal, or abnormally high based on the records you have before you, of course?

A. Uh, yes, I did. Now, I—would you like for me to review the statements of information for



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each year or just tell you what my finding was?

Q. Just your findings, because the statements for earnings are now before the Court.

A. All right.

Q. And there is no problem with that; your findings and your conclusion, if you will.

A. What I did, I had one of our men in our credit department take a look at other mortgage brokerage firms to see what they brought down to earnings and relate it to net worth, Don Lerding, an officer of the bank who was at my direction did analyse these statements.

Mr. Anderson: May it please the Court; this witness has, by his own testimony, indicated that he did not do the work and we therefore object.

Mr. Reutlinger: The work was done under his control.

By the Court: Yes, I'll overrule it at this time; I want to hear what he says.

Q. All right.

A. All right; Don Lerding, an officer of the bank, analyzed these statements and related the earnings to the net worth of the respective companies.

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I found that, unfortunately, we did not have the operating earnings statement except on two other mortgage brokerage firms that might be somewhat comparable in operation to the U.S. Steel Homes.

Now then, for the year ending December 31, 1960, on of the companies showed an earnings to net worth of .055%. That was one of the companies.

Now, for the same year another one of the companies that I used as a comparison showed an earnings as the end of 1960 of .056% of earnings to net worth.

In analyzing the United States Steel Home Credit Corporation for the year 1960, they showed an earnings to net

worth of .045%. So, their earnings were slightly less than the earnings of the other two that I used for comparison purposes.

For the year 1961, ending in 1961, one of the companies that we used as a comparison showed an earnings of .074% to net worth. The other one showed an earnings of .049% to net worth.

United States Steel Homes showed earnings of .048% to net worth. Now, in 1962 we did not have available the earnings from one of the corporations that I used in the prior two years, but for the one that we did

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have, the operating statement from 1962, this company showed an earnings of .041 to net worth.

United States Steel Homes in 1962, for the year ending December 31, 1962, showed earnings of .089.

Now, in looking at this statement that is before me, the year 1962, United States Steel Homes did not charge off nor did they make any provision for bad debts during the year 1962, however, they made a provision of $171,000 for bad debts in 1961 and a provision of $99,750 of bad debts in 1960.

Now, this is rather unusual because having experienced a two hundred—roughly two hundred—$270,000 in provision for bad debts for 1960 and 1961 that they showed no provision for bad debts in 1962.

Now, if you averaged the two prior years, that would be about $135,000.

For the 1962, add the $135,000 then charged or provision of $135,000 averaging the two prior years out for bad debts, that would have indicated a loss of $15,000 in round figures for United States Steel Homes for 1962 instead of a profit of $120,000.

Now, this does seem rather odd that they did not make any provision for the bad debts where they had



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made provision before. Now, I can't answer why they didn't.

Q. Well—

Mr. Anderson: May it please the Court; Mr. Dobbins is not—has not qualified himself as the auditor for United States Steel Homes Credit Corporation.

Mr. Reutlinger: Those are your figures.

Mr. Anderson: This is the audit of the Price-Waterhouse of Credit Corporation made by the Credit Corporation's auditors, your Honor, and I don't think under Mr. Dobbins' own testimony that he is qualified to draw these last conclusions that he has drawn about about bad debts because he was not a member of the company and did not prepare the figures and I move to strike that portion of his testimony.

By the Court: Let it be overruled.

Q. Now, Mr. Dobbins, based on your analysis of the figures before you, do you have any conclusion about the quality of the earnings of the Credit Corporation during the three years we have reviewed?

A. Uh, my only conclusion is that from what

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I see here that their earnings are in line with the earnings of the other two comparable companies that we took for comparison.

Q. They are not abnormal or subnormal?

A. No, no.

Q. Mr. Dobbins—and this is a highly technical point—you have been talking about United States Steel Homes, but if you will, look carefully at this exhibit and I think you will see that you have been referring to the figures of the United States Steel Homes Credit Corporation?

A. Yes, I beg your pardon; that is correct.

Q. Well, the reason I made that observation is that there are two corporations involved and this is but one of them.

A. Yes, U.S. Steel Homes Credit Corporation.

Q. Yes. Are you appearing here today pursuant to a subpoena served on you by the U. S. Marshal?

A. Yes, I am.

Mr. Reutlinger: I have no further questions.

Cross-examination

By Mr. Hamilton:

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Q. Mr. Dobbins, I am going to show you an affidavit and ask you if this is an affidavit that you made at the request of the United States Steel Corporation?

A. Yes, it is.

Q. Would you read that affidavit, if you would, please?

A. (Reading):

"Affiant, after being duly sworn, states that his name is Innes W. Dobbins, Jr., that he is Executive Vice-President of the Liberty National Bank and Trust Company of Louisville, Kentucky;

"That his duties are with the general administration of the bank and with transactions involving real estate and mortgage loans.

"Affiant states that he has continually employed with the Liberty National Bank and Trust Company since 1933; the duties some similar to that above described and that during the years 1960 to 1961 he was Vice-Pres-

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ident of said bank.

"Affiant states that for the years indicated below, the approximate dollar volume of real estate mortgages recorded in Jefferson County, Kentucky, were as follows:—"





Q. (Interrupting) Mr. Dobbins, excuse me a moment; now, would you go a bit slowly when you get to the pertinent part? I'd like to put these numbers down.

Mr. Anderson: Did you say approximate dollar volume?

The Witness: Yes, approximate dollar volume.

In 1958—now, do you want all of these, 1958, or just the years—

Q. (Interrupting) Well, start at 1960 if you would, Mr. Dobbins.

A. 1960; all right. In 1960, $133,316,000; in 1961, $146,350,000; in 1962, $177,934,000.

"Affiant states that apart from the real estate mortgages above described for the years indicated below there were additional funds from local

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sources in excess of the figures below set forth in the Louisville-Jefferson County, Kentucky area for financing."

Q. All right, sir; can you just read those?

A. Starting with 1960 again?

Q. Well, you can start with 1958 and just read the complete affidavit.

A. All right.

"1958, $186,661,000; 1959, $181,171,000; 1960, $163,330,000; 1961, $213,824,000; 1962, $204,891,000."

Q. Now, Mr. Dobbins, the last figures that you just read, aren't those figures a bit different, though I don't think it is too significant, but weren't they a bit different than the ones that you gave us a few moments ago from the stand?

A. Yes, they are different. Let's see; there was a difference of about $11,000,000 in the 1958 total. Do you want me to go down this line?

Q. Yes, if you would, please.

A. All right; in 1959 there was about a $3,000,000 difference. In 1960, the difference was about -7,000,000. In 1961, the difference was about $9,000,000. In 1962, the difference was about

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$2,700,000.

Q. Now, Mr. Dobbins, so the record is straight, could you tell the jury why the difference in amounts?

A. I am embarrased, but the—

Mr. Reutlinger: (Interrupting) I think, Mr. Dobbins, tell him the truth; you are sworn to do it.

The Witness: I'll tell him. I got these figures together and compiled the figures and turned over on that occasion to Counsel, Mr. Reutlinger, to run the adding machine tape on them and he didn't run it very accurately. Now, that's exactly what happened.

(General laughter at this point.)

By the Court: Lawyers are poor mathematicians.

Mr. Reutlinger: That's why I went into law school, Judge; I couldn't do arithmetic.

Q. Okay. Now, Mr. Dobbins, we see that there are—these I believe, represent the amounts of the mortgages that were recorded in Jefferson County, Kentucky during the respective years; is that correct?

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A. This is correct, yes.

Q. We see that in 1960 there was $133,000,000?

A. Yes.

Q. There was a significant increase to $146,000,000 in 1961 and another increase to $177,000,000 in 1962, correct?

A. That is correct.

Q. Would that indicate to you, Mr. Dobbins, that there was a significant slackening or slump in the real estate



business in Jefferson County, Kentucky, during those years?

A. Well, I think if you will look back we will all recall that that was, I believe, wasn't that the year that Kennedy was elected, 1960? I mean let's recall that historically; John F. Kennedy was elected President and went in that year. There was a recession that we had in the last year or so of the Eisenhower administration and business, generally, was slack at that time and if you will recall, Kennedy made some rather drastic and unusual revisions in the income tax.

In other words, instead of raising the taxes, he decreased the taxes and rather set the economy off into an upward swing and then Johnson later took over and carried on that upward swing. Now, in 1960 business

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generally was not good.

Q. Well now, it indicates that we were in quite an upward swing in 1961 from these figures.

A. Oh, yes, no doubt about that.

Q. And the upward swing was continuing through 1962; is that correct?

A. Oh yes.

Q. Now, Mr. Dobbins, you spoke of I believe Prudential Insurance Company making some one hundred per cent loans. Could you tell the Court and jury to whom those loans were made?

A. No. I qualified my remark to the extent that I had not researched this.

Q. You had not researched it?

A. No, I had not.

Q. Can you tell this Court and jury with absolute certainty that the Prudential Life Insurance Company made some hundred per cent loans during this period of time?

A. Only to the extent that I was informed they were doing so.

Q. You do not know the precise terms of those loans then; is that correct?

A. Only as I outlined.

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Q. Well, would you go over that again for me, please sir, as to the terms of those loans?

A. Yes. Let's see; I know—that was told to me by Clyde Parrantine. I know that—

Q. (Interrupting) Well now, I would like to—

Mr. Reutlinger: (Interrupting) If Your Honor please, he asked this question.

Q. All right. Let him go.

A. Is this right?

Q. Just go right on.

A. This is, as I said before, that Horn, one of the owners of the Louisville Mortgage Service Company, a mortgage broker here, uh, I heard this from him and some other—I don't recall exactly—that they were doing this in representing their insurance clients.

Of course, in the case of Prudential they handled through their loan office and did not go through brokers, but it was explained to me and I came into contact with this, but not intimately because we are not competing as a bank in that particular area.

We are not permitted to buy, by law, to make this type of loan, but we knew what the competition was doing and they made these loans and in the case of uh,

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uh, Louisville Mortgage Service, they would take F.H.A. mortgage commitments for construction of houses that were proposed to be built on different sits in certain instances, and G.I. commitment, perhaps as the case might be,



get them approved; if the house plans themselves were not approved the lots were approved by F.H.A. or the V.A. and, uh, they—if they could go through—if it were a builder, building and developing the subdivision himself, why, he would present plans and specifications and get the actual commitment as to what F.H.A. would lend on this house so they would be in a position to tell any prospective purchaser what they could borrow on it.

Now, the purpose being to control, as nearly as possible, the direction of those loans to their respective client as an incentive to be able to get the hundred per cent financing from the client as an accomodation to the developer.

Q. I see; now this was Horn who was doing this these years; is that correct?

A. Well, that is my understanding, yes.

Q. Okay.

A. Now, I want to say this; that wouldn't represent all of their business; that would be in the

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line of their general business.

Q. Yes.

A. Now, that's for development of the subdivision.

Q. Yes sir.

A. By the Court: I can't let you make a purported transcript of the testimony, Mr. Hamilton.

Mr. Hamilton: All right sir.

By the Court: The jury will have to remember what Mr. Dobbins said.

Mr. Hamilton: All right sir.

Q. Mr. Dobbins, could you tell us what the prime rate was during these three years?

A. Quite a bit below what is it now.

Q. Yes sir.

A. I can't—don't hold me to this, but I think it was probably in the area of four and a half or five per cent.

Q. Yes sir. Now, I would like to ask you a hypothetical question, Mr. Dobbins. If a gentleman walked into your bank and said that he had a corporation with a $16,000 deficit and he would like to make a one hundred per cent loan for the purchase and devel-

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opment of real estate and that he was not going to personally going to guarantee it or offer the bank any other collateral to accomplish this purpose, and that he was willing to pay you—and I'm again referring you back to these periods of time when the prime rate was approximately four and a half per cent—if he would offer to pay you six per cent interest and give you a 1.6 discount, would you make that loan in a significant amount?

A. Well, I'll have to qualify that. As a bank, in the first place, we were legally permitted to make the loan.

Q. All right sir.

A. It would be an illegal loan.

Q. Yes sir.

A. And we wouldn't make it on the basis of credit anyway.

Q. All right sir. Now, to your knowledge as a financial expert, do you know of any lending institution that would make such a loan under those conditions?

A. You know, this—uh, this is a difficult kind of question to answer in generalities because I can tell you, uh, I can tell you what we have done if

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it is relevant to this question.

Q. Well, I would—

Mr. Reutlinger: Your Honor, please, if—he asked the question; I think the witness is entitled to answer.

By the Court: Yes.

Mr. Anderson: We are entitled to a responsive answer, your Honor.





Mr. Reutlinger: How do you know until he finishes the answer?

By the Court: Well, can you answer Mr. Hamilton's question?

The Witness: Yes, I think I can.

By the Court: All right.

The Witness: I would say that on occasions we have made loans to people who did not appear credit-worthy on the basis of that statement, but in an anlysis of that statement, if—if we got into it and knew the reason for the deficit, knew the man was honest, knew the man had a good reputation, knew that he knew his business, we have backed people without any capital in certain ways and, at time, when we knew that they had the ability, the background, the

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integrity and so forth, and we have loaned them money, uh, in various ways where we could find the legal ways to do it if we believed in the man. Does that answer your question?

Q. Yes. Well now, I'd like to ask you one.

A. Yeah.

Q. Is it not true that you would generally ask this man for his personal guarantee, Mr. Dobbins?

A. Yes, undoubtedly.

Q. You would undoubtedly ask him for his personal guarantee?

A. We would ask him for that as a bank.

Q. Mr. Dobbins, you indicated some earnings of mortgage service companies, I believe, sir, a few moments ago?

A. Yes.

Q. I wonder if you would tell us the name of the company—of the two companies that you used to compare to the United States Steel Credit Corporation?

A. Uh, no, uh, I would prefer not to do that. I can

draw the conclusions, but the reason I would prefer not to is that, uh, these earnings really were confidential as between the bank and the client.

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So, I have the figures here, but I—I felt that I could use the comparisons because I wanted to be certain that I was making a statement that would be proper and right, but I don't think that you would want me to give your earnings statements and neither do I think I should publish them publicly without the consent of these corporate entities.

Mr. Anderson: Well, I sympathize with Mr. Dobbins' position, your Honor, but he brought the figures here and told us about them and we are entitled to know.

By the Court: Were these figures given to you as a result of the confidential relationship between the two mortgage lending companies and your institution?

The Witness: This is correct.

By the Court: Well, are these figures made available to the public in any fashion, that is, the stockholders of the mortgage companies?

The Witness: Uh, I presume, Judge, that they are made available to the stockholders of the companies, but they don't publish the statements

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like a bank publishes theirs.

By the Court: What do you have to say to that, Mr. Reutlinger?

Mr. Reutlinger: Well, I think that—I of course don't represent Mr. Dobbins; don't represent the bank. Obviously, I have no objection. The objection is purely that of the witness.

I make this observation; the figures they used are quite old and if Mr. Dobbins can overcome his reluctance based on the age of the figures, I personally would appreciate it.



Obviously, I can't tell him not to. I can't object to the disclosure.

I suggest perhaps the age of the figures means that they are meaningless for any further purpose.

The Witness: That's right. Well—

Mr. Hamilton: (Interrupting) If the Court please—

Mr. Reutlinger: (Interrupting) We have no objection.

The Witness: If you wish I will make these available to you. I don't think that the principals could really object although I follow a general policy of never making any information

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available of this sort.

Mr. Hamilton: If the Court please—

By the Court: (Interrupting) I think it would be protective to you, Mr. Dobbins, if I ordered you to make them available.

The Witness: That would be fine. All right; do you want me to give you the names?

Mr. Reutlinger: If you would.

Mr. Hamilton: I was going to say to the Court that I don't—it is not our purpose here, and I am not certain it is imperative to our case. I would like to ask that the names be put in the record, perhaps, confidentially so that if something later on in the trial develops that would make this more significant than what it appears to be now we could then speak to these people.

Mr. Reutlinger: We certainly have no objection.

By the Court: Mr. Dobbins can furnish the names to the Court later.

Mr. Reutlinger: All right sir.

Mr. Hamilton: Fine.

Q. Mr. Dobbins, do you know how many mort-

gage loan companies there are in Louisville and Jefferson County?

A. Well, I could take these records here and think you could tell.

Q. Well, just tell us approximately if you can.

A. Let me see; oh, I would say offhand that there are probably eight in this general area.

Q. So, your analysis, in other words, was made on—I believe you said the other figures weren't available to you, but you used two companies out of the eight, in other words, to draw the analogy?

A. Yes, I would say somewhere in that vicinity.

Mr. Hamilton: All right sir. I have no further questions.

Mr. Reutlinger: Nothing further.

By the Court: You may stand aside, Mr. Dobbins. Sometime at your convenience you can furnish me those names.

Mr. Reutlinger: He can give them to you right now.

The Witness: I have them



right here.

Mr. Reutlinger: I will tell Counsel.

By the Court: Yes. Now, we've been going about an hour, gentlemen; we will take a recess. Ladies and gentlemen, remember the admonitions of the Court and do not discuss this matter among yourselves or with any other person and do not allow it to be discussed in your presence, sight or hearing and be back in your seats in ten minutes.

• • • • • •







By the Court: All right.

At this point Mr. Kenneth L. Anderson, Esq. took the witness chair and the following proceeding occurred:

Mr. Anderson: First, I am going to read from Paragraphs 1, 2 and 3 of the request for admissions which I served on the Defendant, United States Steel Corporation, on April 28, 1970;

(Reading):

"That Document 238 is a two-page letter from David H. Boyd, President of the Homes Division of United States Steel Corporation to Merrill Russell, Assistant General Solicitor, United States Steel Corporation, dated August 1, 1962, and that said document was prepared and maintained in the regular course of business by United States Steel Corporation."

"No. 2; that Document 239 is a four



page memorandum dated July 31, 1962 from Andrew Cowart of United States Steel Corporation to Harry R. Black of United States Steel Corporation and that said document was prepared and maintained in the regular course of business by United States Steel Corporation and was an attachment to Document 238."

"No. 3; that Document 240 is a true and accurate copy of a portion of the sales manual of the Homes Division of United States Steel Corporation and that said portion of the sales manual was prepared and maintained in the regular course of business by United States Steel Corporation and that said document accurately sets forth the sales policies of United States Steel Corporations' Homes Division during the years 1960 through 1962."

Now, if I may refer, your Honor, to the response to the request for admissions—

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Mr. Reutlinger: (Interrupting) We didn't make any objection to those, did we?

Mr. Anderson: You said something about No. 3, about it being part of it.

Mr. Reutlinger: That's right; it's all right.

Mr. Anderson: If the Court please; may I read from here (Indicating)?

By the Court: Yes.

Mr. Anderson: This is the response to request for admissions signed by Mr. Forest J. Stump, President of Homes Division, on May 7, 1970, and it says with regard to request No. 3 that—states that:

> "Document 240 does not purport to nor does it set forth all of the, nor the entire sale policies of this Defendant during the years in question."

There was no response other than that, your Honor, to Nos. 1, 2 and 3 and we therefore offer the described documents in Items 1, 2 and 3 of the request for admissions as Plaintiff's Exhibit No. 238.

By the Court: Let it be filed.

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MR. STANLEY MACK, called as a witness by the Plaintiff, having been first duly sworn, was examined and testified as follows, to-wit:

Direct Examination

By Mr. Anderson:

Q. Mr. Mack, would you give us your full name, please?

A. Stanley Mack.

Q. And where do you live?





A. I live on Glenwood Road in Louisville, Kentucky.

Q. By whom are you employed?

A. U. S. Steel Homes Credit Corporation.

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Q. And how long have you been employed by the Credit Corporation?

A. Since February 1 of this year.

Q. All right; prior to that time by whom were you employed?

A. U. S. Steel Homes Division.

Q. And were you so employed in 1959, 1960, 1961 and 1962?

A. Yes.

Q. And what was your position with the Homes Division in the latter part of 1959 and 1960?

A. I was Manager of Sales Division—development in the sales department.

Q. And you did maintain that position through 1961 and 1962?

A. Yes.

Q. Now, what did your job involve?

A. It involved a number of things. One was sales supervision of some of the sales personnel, the field sales personnel; various administrative duties, including advertising, sales training, uh, this type of thing.

Q. Under your sales training function did you supervise any seminars or things of that nature for

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the salesmen?

A. Yes, I did.

Q. And when those seminars would take place would written presentations be made to the salesmen?

A. Yes, they would.

Q. And when the written presentations were prepared

were they—uh, I'm getting a little ahead of myself here, really.

Prior to the seminars being given would you request some of the salesmen to, uh, present them or what type of personnel would present the seminars?

A. Well, various types, depending on the subject that was being covered at the time, but yes, it might be a salesman who, uh, is relating his particular experience, or his particular skills.

It could be other people in the sales department. I could involve people outside of sales in the plant, for example; any number of people, depending on what was being covered.

Q. All right; the particular people who were giving the presentations were conversant with the subject that they were to talk about or obviously they wouldn't be giving them, is that right?

A. Yes.

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Q. Now, who was Mr. Neal Day in 1961?

A. Mr. Neal Day, I believe, was Manager of Field Sales at that time.

Q. And generally, what did his duties involve?

A. Supervising salesmen in the field and also, I might add, calling on accounts himself.

Q. He would—uh, he was sort of a traveling strawboss; boss of the various salesmen then?

A. Uh, in a manner of speaking, yes.

Q. All right; you remember when we took your deposition?

A. Yes sir.

Q. Quite a long time ago, and Mr. Black and you produced at that time for us what was generally described as the sales manual in two parts?



A. Right.

Q. I will ask you if you can identify that (Indicating); it has been marked as Plaintiff's Exhibit No. 7, and I'll ask you if you can identify that as the first portion of the sales manual which you provided for us?

A. Yes, I believe it is.

Mr. Anderson: All right; we

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will offer that in evidence, Your Honor.

By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 7 was received in evidence.)

Q. Then, I will show you Plaintiff's Exhibit No. 8 and it is entitled "Direction and Service for the Field Representative", and ask you if that is the second part of that document that you produced for us?

A. This—I can't identify this, although it may very well be.

Mr. Reutlinger: Well, I think this one Mr. Black has—this of course is a Xerox copy and it had that black cover, you remember that we spoke about.

The Witness: Yes, I do, and as I indicated to you at that time, I wouldn't doubt that it was, but I couldn't be positive.

Mr. Reutlinger: Can, you remember the colloquy I had with you. We don't—let it go, is what I'm saying.

Mr. Anderson: We will offer that, Your Honor.

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By the Court: Let it be filed.

(Whereupon Plaintiff's Exhibit No. 8 was received in evidence.)

Mr. Reutlinger: If it is not in my possession officially, it is certainly a document of ours.

Mr. Anderson: Right.

Mr. Reutlinger: Okay; thank you.

Q. Now, sir, I would refer you to Plaintiff's Exhibit No. 7 and back in this document or volume it is broken down according to subheadings and can you find the portion that says, "Land Acquisition and Financing"?

A. What page is that?

Q. I can't give you a page number because the pages aren't numbered consecutively, Mr. Mack. There are series of them, actually, in there.

A. I found financing. I have just—

Q. Right; keep on going and it is about two-thirds of the way back.

A. Yes, land acquisition and development.

Q. All right sir. Now, I will ask you if you recall this being a part of the presentation made

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by Mr. Neal Day. I will refer you to page 16 of that which is the last page of that particular portion or presentation by Mr. Day on March 27, 1961, and one of these seminars that you told us about?

A. Yes.

Q. All right. Now, sir, prior to Mr. Day giving this seminar—

A. (Interrupting) Excuse me; may I ask a question here?

Q. Yes.

A. Your previous question here referring to page 16, what were you referring to there?

Q. I was referring you to the date there, to refresh your memory.

A. All right; okay.

Q. As to the date.

A. Thank you.



Q. Prior to the submission of the seminar in question this was prepared in writing in this form?

A. Yes.

Q. And submitted to you?

A. Yes.

Q. And it was discussed with Mr. Black?

A. Uh, I will assume so. I don't know that

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it was.

Q. Well, sir, isn't it correct that this was reviewed by you and Mr. Black, and, uh, with the Credit Corporation?

A. No, not entirely. It may or may not have been reviewed and approved, but in putting together a seminar materials could have been prepared by other people and not necessarily cleared by letters given by these people as part of the total seminar.

This particular selection here on construction or on financing may or may not have been cleared,—not cleared, but reviewed; I don't know.

Q. Well, let me ask you these questions; you remember giving your deposition?

A. Yes.

Q. On August 17, 1964?

A. Yes, I remember.

Mr. Reutlinger: '64?

Mr. Anderson: Yes, August 17, 1964.

Mr. Reutlinger: That's right, right.

Q. At pages 12 and 13, let me ask you if these questions were asked you and if you gave these

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answers, sir:

"Q. Now, the presentation, of course—"

And this is referring to this document (Indicating): (Continuing)

"—was written up prior to it being given by Mr. Day at the meeting?

A. Right.

Q. And was it shown to you ahead of time?

A. Yes.

Q. And was it approved by you?

A. Well, approved in the sense that I was in charge of the program, yes.

Q. To your knowledge, was it also shown to Mr. Black?

A. To the best of my knowledge, yes sir, but I might add it wasn't a case of approving or disapproving the material that was in it, but rather as a part of the overall pro-

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gram that was being given to the salesmen at that time.

Q. But this certainly was a part of the program?

A. Oh, yes.

Q. Presented to the salesmen?

A. Yes, yes.

Q. And the program, of course, was designed as a part either of an initial training course or refresher course?

A. It was a refresher.

Q. Prior to the preparation of the presentations if those presentations involved the financing aspect of a salesman's job for Homes Division would you or Mr. Black or some other member of management consult with the Credit Corporation representatives as to policies of the Credit Corporation?

A. We would consult with them.

Q. Yes, chances are, yes."

Now, were those questions asked you and did



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you give those answers?

A. Yes.

Mr. Reutlinger: Your Honor please, I suggest this was unnecessary. I don't believe the witness' answers prior to the disclosure from the deposition varied at all.

By the Court: Well, that is up to the judgment of the jury.

Mr. Reutlinger: All right, sir.

Q. Did you answer affirmatively to the last question?

A. Yes, yes.

Q. All right sir. Now, I would refer you to page 6 of the document that you have there that is entitled, "Land Acquisition and Development" financing.

A. Yes, I have it.

Q. All right; it starts out:

"There are a couple of factors—"

A. Un-hnh.

Q. All right sir; would you read to the jury all of page 6 and down to where the last paragraph begins on page 7?

A. (Reading):

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"There are a couple of factors incorporated in the loan agreements during the past year or so that give both you and the Credit Corporation a safety valve. As you probably know, most of the other major manufacturers make development loans in some form or another, but most of them charge a fee of 10% or more in addition to simple interest. We only charge ½ point fee. This, of course, puts us in a very competitive position, but there have been cases in the past where it worked against us. The ½ point fee and

6% interest being very attractive on land loans, some developers have set up a program with us, borrowed the money, developed lots, then offered a complete development to another investor, paying off the Credit Corporation and never building a house. This accomplishes nothing for us. So, today, the Credit Corporation has them sign a contingent liability note for 5% per year on the principal bal-

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ance not to exceed 2 years.

"While this note would be executed, recorded and in effect disbursed, it would not bear interest and would only become effective at the end of the one or two year period if the dealer had not taken the necessary number of houses to retire the loan. Let me illustrate.

"Let's go back to the hypothetical case used earlier. The Credit Corporation made a loan in the amount of $60,000 which we determined would be paid off through the shipment of 22 homes. A note would be signed for $3,000 for one year or $6,000 for two years. A program is opened, sales are made and the 22 houses are shipped. The note is then automatically satisfied.

"But, let's say that the program is opened, sales are not made or are very slow. The loan matures and only

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a few homes have been shipped. The note is collectible. Actually, it can be set up for 5% for one year with an option to renew at 10% for the second year and waiving the 5% for the first. Then, if 22 homes are shipped before the end of the second year, no penalty is administered."

Q. Go ahead and read the next paragraph.



A. (Reading):

"Does this approach sound a little rough on the dealer? I don't think so. Remember, he helped to determine a conservative one year program of development, in this case 40 lots. But the loan is paid back in only 22 lots. All you're asking him to do is produce in two years what he said could be done in less than one.

"Do you see the lever that this gives you? He is more likely to push hard to sell our houses when there is a penalty if he doesn't.

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People like to take the line of least resistance. Before this clause was put in, a program could be opened, and start slowly. It was easy to say, 'It's obviously the product, we'll go back to conventional or something else'.

"Now a program is opened, sales start slowly and the thinking is, 'Let's bring in a new model', or 'Let's improve on our advertising'. I think it gives us an excellent sales tool. It is not necessary for you to try to explain this to your dealer or prospect. It can be a matter of negotiation between the dealer and the Credit Corporation. I just wanted you to be aware of it".

Q. I would ask you then to turn to page 11.

A. (Doing so).

Q. There is a paragraph that starts on this page—see that, Mr. Mack, "There have been a good number of special loans—"?

A. Yes.

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Q. Would you read that paragraph, please sir.

A. All right; (Reading):

*Testimony of Mr. Stanley Mack*

"There have been a good number of special loans made in the past three years, each one a little different, but each one with some merit.

"Conversely, in some cases the Credit Corporation turned down what seemed to be a good real estate loan, but didn't look as though it would produce home shipments. I know of one case where there was a choice piece of ground, in an excellent location, supported by a strong market. The requested loan was to be guaranteed by a multi-million dollar corporation. From a pure real estate investment standpoint, it was excellent.

"However, we chose not to recommend the loan to the Credit Corporation because we couldn't see a full time qualified general manager or anyone in the organization with the ability or the time to merchandise our homes.

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"In other words, I just didn't see how we would get very many houses shipped. Sure, the loan was secure, and the Credit Corporation would be paid back, but we wouldn't accomplish our only purpose in making the loan and that is shipping houses. That's why the Credit Corporation exists and that should be our first consideration before requesting financing assistance."

Q. Now, sir, turn to page 12 and read the paragraph above it says, "Example", which starts with "Remember that the first—".

A. (Reading):

"Remember that the first consideration of the Sales Department before requesting any type of financing assistance is the commercial value of the program to the Homes Division. Financing is simply one of several tools that we have available for securing more